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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

DIANE SANK,

Petitioner,

v.

NEW JERSEY, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of The
State Of New Jersey

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner was constructively denied appellate review and a judgement on the merits of her claim by the New Jersey Courts which affirmed the lower courts' denial of relief without written opinions. The Petitioner was an unsuccessful Republican candidate in a Primary race for a Municipal Council seat. She lost by 13 votes. Her opponents were publicly endorsed by the Republican Party on the ballots ***contra*** to *N.J.S.* 19:34-52, and although the Petitioner won the preferred number one position on the ballot in a blind drawing as provided by *N.J.S.* 19:23-24, and the right to use the Republican Party slogan pursuant to *N.J.S.* 19:23-18, the County Clerk and the County Head of the Republican Party removed her from Position One on the ballot and took away the Party slogan from her before printing the ballots. The questions presented by this petition are:

1. Whether the New Jersey Supreme Court erred in denying Petitioner's motion for leave to appeal Appellate Court's denial of emergent relief, inasmuch as the Respondents violated New Jersey Statutes 19:23-18, 19:23-24, and 19:34-52; and New Jersey Statute 19:49-2 is unconstitutional, thus denying Petitioner due process and equal protection of the law under the Fifth and Fourteenth Amendments.

2. Whether the New Jersey Superior Court (Appellate Division) erred in denying Petitioner emergent relief, inasmuch as the Respondents violated New Jersey Statutes 19:23-18, 19:23-24, and 19:34-52, and New Jersey Statute 19:49-2 is unconstitutional, thus denying Petitioner due process and equal protection of the law under the Fifth and Fourteenth Amendments.

QUESTIONS PRESENTED – Continued

3. Whether endorsement of a candidate prior to a Primary Election is an unconstitutional exercise of the powers of the County Clerk and the County Republican Chairman in violation of Petitioner's due process and equal protection rights under the Fifth and Fourteenth Amendments.

4. Whether the act of taking away the Column One position and the party slogan, which were property rights granted to Petitioner pursuant to New Jersey Statutes 19:23-18 and 19:23-24, is a violation of Petitioner's due process and equal protection rights and the Taking Clause of the Fifth and Fourteenth Amendments.

5. Whether the repositioning of Petitioner on the Ballot, which was paid for with County (public) monies, is a violation of Petitioner's due process rights to a public notice and hearing under the New Jersey Open Public Meetings Act (*N.J.S.* 10:4-6 et seq.).

6. *An issue of first impression:* Whether the registered voters of a political party have a right to choose the candidates who will represent their party in a General Election via a Primary Election or whether that right belongs to a political party's hierarchy.

7. Whether a Primary Election candidates's rights to a column position as per *N.J.S.* 19:23-24 and chosen slogan as per *N.J.S.* 19:23-18 are nullified by operation of *N.J.S.* 19:49-2.

8. *An issue of first impression:* Whether *N.J.S.* 19:49-2 is constitutionally and fatally flawed by its lack of procedural safeguards designed to provide due process and equal protection to all candidates to the exclusion of a suspect class of candidates created by the Bergen County Republican County Committee.

QUESTIONS PRESENTED – Continued

9. *An issue of first impression:* Whether a meeting of the County Clerk and the County Committee Chairman for the purpose of positioning and endorsing candidates on the Primary Election ballot is subject to the New Jersey State Open Public Meetings Act and the remedy provided therein.

LIST OF PARTIES

This case arises from the denial of a rehearing of the case before the New Jersey Supreme Court after the New Jersey Appellate Court also denied rehearing the case. Both denials were without written opinion. Petitioner is the same as in the caption. All parties, who are the Respondents, are as follows:

The State of New Jersey;

Kathleen A. Donovan, in her Official Capacity as Clerk of the County of Bergen and the Office of the County Clerk of Bergen County;

Henry Shotmeyer, in his Official Capacity as Chairman of the Bergen County Republican Organization and the Office of the Chairman of the Bergen County Republican Organization;

Angelo R. Mungioli, as Chair of the Republican (Municipal) "County Committee" of Englewood Cliffs;

Roger Wasik, as Republican Primary Candidate for Office of Council in Englewood Cliffs;

Nurhan Helvacian, as Republican Primary Candidate for Office of Council in Englewood Cliffs;

Thomas Manolio, as Democratic Primary Candidate for Office of Council in Englewood Cliffs;

Ilan Plawker, as Democratic Primary Candidate for Office of Council in Englewood Cliffs;

John Doe and/or Jane Doe I through X (Where X being a number at present unknown)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment below and Order of the New Jersey Supreme Court dated September 2, 1998.

OPINIONS AND ORDERS BELOW

The Order (without written decision), dated September 2, 1998, to deny rehearing by the New Jersey Supreme Court appears in Appendix at 1a. The Order, (without written decision), dated August 19, 1998, to deny rehearing by the New Jersey Superior Court, Appellate Division, appears in the Appendix at 2a. The Order dated July 30, 1998, by the New Jersey Superior Court, Law Division to dismiss the action without prejudice and without costs as to all parties, appears in Appendix at 31a. The decision on the merits of the case, dated July 23, 1998 by the New Jersey Superior Court, was rendered orally from the Bench and appears as a transcript in Appendix at 4a to 21a. A hearing to settle the form of the order was held, and the order of judgment was signed on July 30, 1998 and appears as a transcript in Appendix at 22a to 30a.

STATEMENT OF JURISDICTION

This case was denied rehearing at both the New Jersey Appellate Court (denied August 19, 1998) and at the New Jersey Supreme Court (denied September 2, 1998). The jurisdiction of this Court rests and is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment of the United States Constitution states:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Fourteenth Amendment of the United States Constitution states:

> **Section 1.** All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. New Jersey State Statutes:

N.J.S. 19:23-18 is set forth in Appendix at 33a.

N.J.S. 19:23-24 is set forth in Appendix at 34a to 36a.

N.J.S. 19:34-52 is set forth in Appendix at 37a.

N.J.S. 19:49-2 is set forth in Appendix at 38a to 40a.

4. New Jersey State Law:

The Open Public Meetings Act ("Sunshine Law") (N.J.S. 10:4-6 et seq.) is set forth in Appendix at 41a to 50a.

STATEMENT OF THE CASE

This is an election case. It presents questions of general public importance that have not been, but should be, settled by this Court. These same questions arise in one form or another every year in election after election across this state and country, to the continuing injuries of candidates similarly situated to the Petitioner herein and to the voters. Further, without resolution of these questions by this Court, Petitioner will be irreparably harmed by the denial of a procedurally fair Primary Election with a non-discriminatory Primary ballot. Without relief, Petitioner is denied the equal protection of the laws of this State and the United States, deprived of her right of political association, property, and a forum protected by the Open Public Meetings Act of New Jersey.

Similarly, the voters in the Primary and General Elections are harmed and prejudiced by not being presented with candidates listed in their legally chosen columns. As a result, the underlying and central issue in this case is whether registered voters of a political party have a right to choose candidates who will represent their party in a General Election via a Primary Election or does that right belong to a political party's hierarchy. By settling the issues of the instant case, this Court, will in fact, resolve this central issue.

A. Background and Facts

The facts surrounding the issues of this case are defined in the trial transcript. Respondents admitted to violating various election laws, including *N.J.S.* 19:23-18, *N.J.S.* 19:23-24, and *N.J.S.* 19:34-52. Respondents justified their actions by relying upon language of *N.J.S.* 19:49-2,

Eu et al. v. San Francisco County Democratic Central Committee, et al., 489 U.S. 214 (1989) and *Quaremba v. Allan*, 67 N.J. 1 (1975). They also argued that none of their actions fell within the purview of the New Jersey Open Public Meetings Act, *N.J.S.* 10:4-6, et seq., and that the case presented no constitutional issues. At trial, they did not present any opening and closing statements, or witnesses, to support their claims.

During the trial, Henry Shotmeyer, the Defendant-Respondent County Committee Chairman for Bergen County, testified that on March 28, 1998 the countywide membership of the County Committee met to fulfill the mandates of their By-Laws, i.e., to select and vote on who would be placed on the Republican Primary Ballot for offices of County Superintendent, Sheriff, County Clerk, and Freeholder. Respondent read pertinent sections of the By-Laws, that the Committee endorse Republican candidates, specifically, "prior to the Primary." These By-Laws also provided for the "selection" and "endorsement" for all Republican candidates for office, including those at the municipal level, and that selected candidates be certified to the County Clerk, "pursuant to Title 19." The Municipal Clerk of Englewood Cliffs testified that pursuant to *N.J.S.* 19:23-18, Petitioner and her running mate submitted to him a "bracketed" nominating petition for the offices of council. It designated the slogan they wished to be placed with their names on the Primary Ballot as "Republicans for Responsible Government." One day later, Roger Wasik and Nurhan Helvacian (the "opposition candidates,") filed their bracketed nominating petitions, requesting the identical slogan. The Clerk advised the opposition candidates they would have to choose a different slogan since the Petitioner had filed

her bracketed nominating petition first, and pursuant to statute had the right to use the slogan. In response they chose their designated second choice: "Republicans for a Two Party System" as their slogan. (Lodged as A)

The Municipal Clerk held a random drawing for column positions on the Municipal Primary Ballot, pursuant to *N.J.S.* 19:23-24. Petitioner and her running mate won the blind draw and received the Column One position on the ballot. The Clerk certified this fact by letter to Defendant-Respondent Bergen County Clerk, Kathleen Donovan. Respondent Bergen County Clerk (as supervisor of elections charged with formatting and printing election ballots), described her meeting with Respondent County Committee Chairman, when the Chairman indicated that the movant and her running mate should be removed from Column One, (a column traditionally, but not according to any statute, reserved by the County Clerk for the slate of county candidates), and also denied the "Republicans for Responsible Government" slogan.

The County Clerk accepted the County Committee Chairman's initialed "signoff sheet" (Lodged as A), listing the municipal candidates endorsed by the County Committee and bracketed with the County slate (County Executive, Sheriff, County Clerk, Freeholders) on the Primary Election ballots. Respondent County Clerk testified she did not notify the public of this meeting, although the County Committee Chair notified the Municipal County Committee Chairs of the meeting. Respondent County Clerk then advised Petitioner and her running mate that they would not be in the organization column (One) in the June 2, 1998 Primary Election, and to choose a new Slogan (as they were denied their slogan).

When Respondent County Committee Chairman was asked how he determined which municipal candidates to bracket with the County Slate on the Primary ballots, he testified that he asked Municipal County Committee Chairs for names of candidates they endorsed for County Committee column and slogan, and used their choices. In Englewood Cliffs, the Municipal Chair was also the Campaign Manager of Petitioner's opposition candidates, whom he endorsed to the County Chair (a conflict of interest). Although Respondent Shotmeyer was the Campaign Manager of the various county candidates, he was not the campaign manager of the various municipal candidates. He admitted that the County Committee By-Laws directed him to endorse candidates prior to the Primary election, and this was done as the "campaign manager" of the county candidates.

On June 2, 1998 (Lodged as B), four Republican candidates, including Petitioner Dr. Diane Sank, ran for two open seats for Council in the Republican Primary Election. The opposition candidates won first and second place, with Petitioner in third place (13 votes behind the second candidate).

B. Proceedings Below

On June 8, 1998, pursuant to *R.* 4:69-6(a), Petitioner timely filed a Verified Complaint in Lieu of Prerogative Writ in Superior Court of Bergen County, Law Division and an Amended Complaint to add the successful Republican and Democratic Primary candidates for Borough Council and the Republican Municipal County Committee chairman, on June 22, 1998. The accelerated trial lasted three days, commencing July 21 and ending on July 23, 1998, with Petitioner's complaint dismissed by Judge

James T. Murphy, who signed the order of judgment on July 30, 1998 (Appendix 31a). On August 10, 1998, Petitioner timely filed and served a notice of motion for emergent relief and a civil case information statement with the Appellate Court. The motion was denied without opinion on August 19, 1998. (Appendix 2a).

The Petitioner, on August 24, 1998, filed a Motion for Leave to Appeal from Appellate Division Denial of Request for Emergent Relief to the New Jersey Supreme Court. The Motion was denied without opinion on September 2, 1998 (Appendix 1a), giving rise to instant Writ of Certiorari before this Court.

REASONS FOR GRANTING THE PETITION

INTRODUCTORY ARGUMENT RELEVANT TO ALL ISSUES

The history of the evolution of legislation governing the Primary Election process in the State of New Jersey is germane to the issues before this court because they stem from a political and philosophical chasm between the organized political party organizations and the individual candidates who, for whatever reason, have not achieved the notice or approval of a political party.

In *Stevenson v. Gilfert*, 13 N.J. 496 (1953), the New Jersey Supreme Court observed that the Primary Election system was adopted so that *members* of the party, rather than party bosses, should choose candidates to represent the party in the general election. *Stevenson* cited to *Ray v. Blair*, 343 U.S. 214, 216 (1952), which observed that:

> . . . political parties were not born with the Republic but were created by necessity; that

> originally nominees for public office were designated by *self-appointed individuals;* that this system was early succeeded by party conventions; and that because of *public dissatisfaction* with the political manipulation of conventions they have been largely superseded by direct party primaries. (emphasis added).

Petitioner submits to this Court that the above cases have relevance for the instant case, inasmuch as all of the injuries which have occurred are nothing more or less than an organized political party and its hierarchy extending their control over the individual candidates and the Primary Election process itself. Each violation of election law in the instant case sought to turn back the clock to a time in history when the party bosses reigned supreme. In the above cited cases, the courts duly noted that the members, not the party hierarchy, should decide who will represent the party. Then after the registered voters of a particular party have made their choice clear in a primary election, only then does the vote go to the electorate at large (i.e., in the General Election). Undoubtedly this is the reason that the New Jersey Legislature enacted *N.J.S.* 19:34-52 which forbids member(s) of a County Committee from "endorsement" of candidates prior to the primary.

As stated in *Motley v. Halpern*, 267 N.J. Super. 325 (Law Div. 1993):

> Primary elections are governed by statute. *N.J.S.* 19:1-1 defines a 'primary election' as 'the procedure whereby the *members of a political party* . . . nominate candidates to be voted for at general elections . . .,' [Furthermore] The primary represents the first step of our two stage election system, the process by which *members of a political party* select that party's candidates for

> the general election. [But more importantly, the Petitioner submits, the Primary Election is also] . . . the major avenue of access to the general election ballot by which the *party membership* determines which candidates it chooses to present to the electorate in that general election. *Primary Elections: The Real Party in Interest*, 27 Rutgers L. Rev. 298, 305 (1974). (emphasis added).

The 1998 June Republican Primary was essentially a closed election. Column positions and slogan assignments were chosen by the Republican Bergen County Chairman, contrary to the New Jersey Statutes – and predetermined the winners in that primary (as research accepted by the Federal Court (*Koppell v. NY State Board of Elections, et al.*, 98 Civ. 4930 (SHS 1998)) found that candidates in Column Two received significantly fewer votes than candidates in Column One; thus one of the reasons for granting the Writ to this Court.

Petitioner submits to this Court that Respondents seek to reintroduce the control of the Primary Election to a select few individuals in contradiction to the constitutional guarantees of due process, property rights, and equal protection of the laws of the Fifth and Fourteenth Amendments and the laws of the State of New Jersey. Petitioner requests this court to craft a judicial remedy that will guarantee to all candidates that constitutional guarantees of due process, property rights and equal protection of the Fifth, Fourteenth Amendments and the legislative intendment of the Primary Election laws will be preserved and the registered voters of a party, not the party hierarchy, will determine who will run in the General Election as the party membership's standard bearers.

I. UNLESS PETITIONER IS GRANTED HEARING AND RELIEF BEFORE THIS SUPREME COURT, UNDER THE DOCTRINE OF REPETITION, "EVADING REVIEW," PETITIONER WILL CONTINUE TO SUFFER LOSS OF HER CONSTITUTIONAL RIGHTS AND BE INJURED IN ALL FUTURE ELECTIONS.

All of the laws involved in this matter (*N.J.S.* 19:23-18, 19:23-24, 19:49-2, 19:34-52, and 10:4-6 et seq.) are still listed and printed in the New Jersey Statutes (and Annotated) volumes, and considered active laws exactly as written, and continue to operate exactly as written and applied. This will and can only result in Petitioner continuing to suffer and be injured by violations of the application of the laws as written and as applied to the instant situations.

As proof of this onerous situation, this Petitioner had a case earlier, involving some (but not all), of the same laws. This case (involving the 1997 Republican Primary Election in Englewood Cliffs, New Jersey, Superior Court Docket No. BER-L-5576 and Appellate Court A-00609-97T3) is currently still on the regular and slow judicial track with a decision from the Appellate Court of New Jersey not yet received.

Petitioner cites to New Jersey Supreme Court case of *Mochary v. Caputo*, 100 N.J. 119 (1985) indicating the recurring issues that deserve this Court's attention. (See also *McGlynn v. New Jersey Public Broadcasting Authority*, 88 N.J. 112 (1981), cited by the Court in *Mochary*.)

The 1997 case and the fact that all of the Statutes mentioned are still listed as New Jersey Statutes and actively utilized, indicate that Petitioner's claims that the issue will not go away and is "capable of repetition, yet

evading review" is more relevant to this case, as Petitioner's events during each ensuing Primary election will be repeated again and again until she gets relief, and until such time as *N.J.S.* 19:49-2 is declared unconstitutional and/or the other statutes involved are decided by a Court and declared violated by the County Clerk, the Bergen County Republican Chairman, and others.

The *Masters, Mates & Pilots v. Brown*, 498 U.S. 466 (1990) case, decided by this Court, shows the similarity to the instant case. In both cases, Petitioner (in instant 1998 case) and Respondent (in 1990 case), " . . . has run for office before and may well do so again." Thus there is a clear *"likelihood"* (in the 1990 case) that the Union's rule, and (in the present case) that the New Jersey State Statutes, including *N.J.S.* 19:49-2 *"would again" make "this controversy sufficiently capable of repetition to preserve our jurisdiction."* "The problem is therefore *'capable of repetition, yet evading review,' Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515 [(1911)]". (emphasis added).

Similarly, in the election cases in Colorado in *Hall v. Beals*, 396 U.S. 45 (1969) and in Illinois in *Moore v. Ogilvie*, 394 U.S. 814 (1969) as in New Jersey in petitioner's case, it was revealed that " . . . as long as [the State] maintains her present system" "The problem before us was" " *'capable of repetition, yet evading review'*." In *Hall v. Beals*, 396 U.S. 45, 49 (1969), "They took a direct appeal to this [Supreme] Court pursuant to 28 U.S.C. Section 1253." (*Hall v. Beals*, 47) (emphasis added).

In *Richardson v. Ramirez*, 418 U.S. 24, 94 S. Ct. 2655, 41 L. Ed. 2d 551, 577 (1974) voters were presented with State (of Tennessee) "residence requirements" that this Court ruled were *"capable of repetition, yet evading review." Moore*

v. Ogilvie, 394 U.S. 814, 816 (emphasis added). Further, the Supreme "Court and the District Court found" that "the case was not moot" as the "issue presented was likely to evade review."

The Court also cited *Roe v. Wade*, 410 U.S. 113 (1973), where the woman " . . . who was not pregnant at the time of the suit" could become so at another time, presenting "a classic example of an issue *capable of repetition, yet evading review . . .* " *Richardson v. Ramirez*, 41 L. Ed. 2d 551, 578 (emphasis added).

So in Petitioner's case, although she lost the 1998 Republican Primary and was not able to be listed as running in the 1998 General Election, therefore, while she is not a candidate at the present time, she is capable of becoming a candidate in a future Primary and General Election. Therefore Petitioner's case qualifies as "capable of repetition, yet evading review."

II. THIS CASE IS REPRESENTATIVE OF A SITUATION REQUIRING EXTRAORDINARY WRIT: RULE 20.

Petitioner has not submitted a separate Extraordinary Writ. Petitioner was informed that this is the process required for instituting procedure before this Court pursuant to Supreme Court Rule 20 "Procedure on a Petition for an Extraordinary Writ." (U.S. Sup. Ct. Rule 20, 28 U.S.C.A.) There are important similarities and issues to be raised that indicate this case's requirement that if it was not submitted as an "Extraordinary Writ" it most definitely would be reason for granting it as an "Ordinary Writ," allowing it to be heard before this Court.

Supreme Court Rule 20 states briefly:

> 1. Issuance by the Court of an extraordinary writ authorized by 28 U.S.C. Section 1651(a) is not a matter of right, but of discretion sparingly exercised. *To justify the granting of any such writ,* the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, *and that adequate relief cannot be obtained in any other form or from any other court.* (emphasis added).

Clearly stated here are tenets from the instant case that match the requirements for granting an Extraordinary Writ. At the time of the September 2, 1998 denial of a hearing before the New Jersey Supreme Court, there was clearly only one place for Petitioner to go to receive an appeal of that denial, the U.S. Supreme Court sitting as the Appellate Division (pursuant to 28 U.S.C. Section 1257(a)) governing this Court's Appellate jurisdiction for all 50 State Supreme Courts (including the New Jersey Supreme Court).

As the laws are still on the books, it is clearly evident that this is certainly (as stated above in greater detail), an action "capable of repetition," to which Petitioner will continue to suffer. (Since then events have unfortunately been mitigated as to relief and remedy to offer Petitioner at this time – though no less "capable of repetition" – by the ensuing 1998 General Election to which Petitioner suffered injury by not having her chance for a special election in time to appear on the November 1998 ballot due to the actions of the New Jersey Appellate and New Jersey Supreme Courts' denying her relief for actions taken against her during the 1998 Primary election).

Covering the third justification of an Extraordinary Writ, clearly, without a hearing on the merits of Petitioner's case before the New Jersey Appellate or New Jersey Supreme Court, and having no where else to turn, Petitioner is unable to receive " . . . adequate relief. . . . in any other form or from any other court." in the U.S.A. Therefore, the only remedy is to insure that by declaring *N.J.S.* 19:49-2 unconstitutional and violative of Petitioner's due process and property rights, that this series of events need never occur again to either Petitioner, or any other similarly situated individual candidate in the State of New Jersey. Petitioner was denied relief at all levels, and will continue to suffer injury inasmuch as stated clearly in *Masters, Mates & Pilots v. Brown*, 498 U.S. 466 at 473, that Petitioner (by her prior history of campaigning and similar experience and injury in the 1997 Republican Primary election) " . . . has run for office before and may well do so again", thus confronting the same laws and events with the same resultant injury.

III. DENIAL OF EMERGENT AND ACCELERATED ELECTION RELIEF BY BOTH NEW JERSEY APPELLATE COURT AND SUPREME COURT WAS IN ERROR.

Exercise of emergent and/or accelerated Appeal process has been held to be most appropriate when the case involves issues of public importance. *State v. Rose*, 173 N.J. Super. 478, 483 (App. Div. 1980).

Elections, by their very nature, are matters involving issues of public importance, thus meeting and exceeding the basic legal requirements for an "emergent" appeal and relief.

In fact, from 1969 until September 1996, there existed in the N.J. Court Rules (*Pressler*, Current N.J. Court Rules, *R.* 1:2-5) a rule specifically directing Trial and Appellate Courts to accord preference to certain cases for accelerated calendar preferencing. Cases the Court believed were so important included: "election actions, actions . . . to which the State . . . is a party;" and "actions in lieu of prerogative writs;" The instant case falls into *all three* of these categories (where only one would have been sufficient). It is an election action, and filed pursuant to *R.* 4:69-6(a) (action in lieu of prerogative writ), and most importantly, the caption always had on it the State of New Jersey as a party-defendant. *Pressler* states that:

> The Official Comment to the 1996 deletion of the rule makes it clear that the deletion of the rule is *not* intended to reflect an altered administrative perception of the necessity for appropriate trial preference. (emphasis added).

In past instances the New Jersey Appellate Court and the New Jersey Supreme Court recognized and acknowledged *election cases*, as a class, as matters involving issues of urgent and great public importance, to receive "emergent" status and/or accelerated hearings and decisions.

For example, the New Jersey Appellate Court heard the following election cases on Emergent Appeal:

Farrington v. Falcey, 96 N.J. Super. 409, 412 (App. Div. 1967); *Bado v. Gilfert*, 13 N.J. Super. 363 (App. Div. 1951) and *Moskowitz v. Grogan*, 101 N.J. Super. 111 (App. Div. 1968) "Since [these cases] affected the primary election to be held on June 4 we decided them orally from the Bench."

The New Jersey Supreme Court heard the following election cases on an Emergent or Accelerated basis:

Catania v. Haberie, 123 N.J. 438 (1991) "In view of the then-impending special election, we announced our decision shortly after oral argument."; *Stevenson v. Gilfert*, 13 N.J. 496, 498 (1953) (heard and decided in one week from the lower Court decision); and *Fields v. Hoffman*, 105 N.J. 262 (1987).

These are examples of cases where the New Jersey Supreme Court heard the merits and arguments of the case on an accelerated basis. In the instant case, since it was not heard before the New Jersey Supreme Court, Petitioner suffered further injury when she was denied her procedurally fair Primary and the possibility of running on the Republican ticket in the November General Election.

IV. WITHOUT THE REVIEW AND ACTION OF THIS COURT AND THE RELIEF REQUESTED IN HER MOTIONS TO THE NEW JERSEY COURTS, IT WILL BE ALMOST IMPOSSIBLE FOR PETITIONER TO WIN IN FUTURE PRIMARIES AND GENERAL ELECTIONS, AND SHE AND SIMILARLY SITUATED CANDIDATES WILL CONTINUE TO BE INJURED NOW AND IN THE FUTURE.

This is an election case that asked for the voiding of a Primary Election tainted by a lack of constitutional rights of due process and equal protection of the law. Petitioner asked for an order for a new Primary Election, a stay of printing of the General Election ballots, and a declaration from the lower Courts that *N.J.S.* 19:49-2 is unconstitutional, and that *N.J.S.* 19:23-24 and 19:23-18 be enforced.

When the New Jersey Appellate and the New Jersey Supreme Courts refused to hear Petitioner's emergent motion for a hearing they erred, denying this right to her

"day in court.", this essentially allowed time to pass so that this injustice could not be corrected, precluding Petitioner's opportunity to have a new Primary or Special Election so as to rectify the actions of the County Clerk and the Bergen County Republican County Committee Chairman.

Therefore Petitioner seeks relief from the United States Supreme Court to have the two lower courts (New Jersey Appellate and Supreme) rule on Petitioner's Motion and to hear the case.

As a general principle of law (*Pressler, R.* 1:2-5), election cases have been granted emergent relief by lower (i.e., New Jersey Appellate and Supreme Courts) and the Supreme Court of the United States. This case presents questions of grave public importance that have not been, but should be, settled by this Court. The injuries suffered by Petitioner are repetitive (i.e., capable of "repetition, yet evading review") and apply to candidates who are similarly situated across the state. These injuries will continue unless this Court addresses the issues raised by this Petition.

V. THE PARTY CHAIRMAN AND COUNTY CLERK VIOLATED THE CLEAR AND UNAMBIGUOUS MEANING OF *N.J.S.* 19:23-18, *N.J.S.* 19:23-24 AND *N.J.S.* 19:49-2 WHEN THEY ACTED IN CONCERT TO REMOVE PETITIONER AND HER RUNNING MATE FROM THEIR COLUMN ONE POSITION AND TO DENY THEM THEIR CHOSEN SLOGAN.

N.J.S. 19:23-18 provides that in a Primary Election the first candidates to submit their nominating petition to their Municipal Clerk are entitled to use the slogan designated on their petition. Further, *N.J.S.* 19:23-24 provides that column position on the Primary Election ballot is

established by a random drawing conducted by the Municipal Clerk. These statutes are clear and unambiguous. Furthermore, they insure fundamental fairness and a level playing field for all candidates.

According to *N.J.S.* 19:49-2, a "campaign manager" for county candidates running in a Primary Election may "consent" to the placement of political affiliates on the party column. It does not, however, give the campaign manager the legislative power to place candidates on the County column if they have not asked for his consent.

In the instant case the opposition candidates submitted to the random drawing pursuant to *N.J.S.* 19:23-24 and indicated on their nominating petition a second contingent slogan that should be used on the Primary ballot if they did not win the random drawing. When the Englewood Cliffs Municipal Clerk advised the Municipal Chairman that the two opponents did not win use of their "first choice" slogan, they told him to use the second choice.

Petitioner won the right to be placed in Column One and given the slogan in a blind drawing, following the words and meaning of two State Statutes: *N.J.S.* 19:23-18 and 19:23-24. So the campaign manager should not have moved Petitioner and her running mate from the Column One Position and Slogan obtained from two State Statutes.

The County Committee Chairman exceeded the grant of power provided a "campaign manager" in *N.J.S.* 19:49-2. If not for his actions, Petitioner would have been listed in Column One with the slogan "Republicans for Responsible Government." The opposition candidates would have occupied Column Two, and the County slate would have occupied Column Three.

The "campaign manager" did not provide the trial court with evidence of a statutory grant that allowed him to act as he did.

Petitioner relies on *Ramsey v. Morris*, 121 N.J. Super. 430 (Ch. Div. 1972), which held:

> . . . if the legislative intendment is clear and unambiguous, the court will not . . . indulge in a presumption arising from extrinsic evidence, that the Legislature intended something other than what it actually expressed.

Petitioner submits that Respondent County Clerk violated the above statute and exceeded her statutory grant of discretion when she assisted Respondent County Committee Chairman's removal of Petitioner and her running mate from Column One and wrote advising them to choose another slogan. Further, Respondent County Clerk is an attorney and should be aware of election laws which she supervised. She was not a disinterested party in these actions. She received the endorsement of the County Committee on March 28, 1998 and was a member of the County and Federal slate to which she granted the coveted Column One position to every municipal level candidate in the June 2 Primary ballot. (Lodged as B).

VI. THE PARTY CHAIRMAN AND COUNTY CLERK, ACTING IN CONCERT, VIOLATED THE OPEN PUBLIC MEETINGS ACT WHEN THEY ACTED AS PUBLIC OFFICIALS TO INJURE THE PETITIONER WITHOUT NOTICE OR PUBLIC HEARING.

Petitioner submits to this Court that the Party Chairman and County Clerk, acting in concert, violated the Open Public Meetings Act when they acted as public officials to injure the petitioner, without notice or public

hearing, actions that made the results of the Englewood Cliffs Primary Election invalid. Further, as per the remedy provided in New Jersey's Open Public Meetings Act (hereinafter referred to as the "OPMA"), a new election is to be ordered when the record clearly showed that the Respondents' actions violated OPMA. *Allan-Deane Corp. v. Bedminster Tp.*, 153 N.J. Super. 114 (A.D. 1977). Furthermore the Trial Court erred when it ruled that the County Committee is not a "public body." To the contrary, *N.J.S.* 10:4-7, which is the codification of the legislative intent with regard to OPMA, specifically incorporates county committees and acts of public bodies which "spend public funds or affect persons' rights." *Scott v. Town of Bloomfield*, 94 N.J. Super. 592 (1967).[1] Printing of the ballots was made using public funds.

The Trial Court also ruled that there was no public meeting and no notice was necessary to the public when the Respondent County Clerk and the Respondent County Committee Chairman met at the County Clerk's office to position the candidates on the ballot (the law states that it takes two public officials for a public purpose). The County Clerk is clearly a public officer, and the U.S. Supreme Court in *Smith v. Allwright*, 321 U.S. 649 (1944) held that officers of Political Committees as well as campaign managers "become an agency of the state" when they have duties imposed upon them by state statute.

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[1] County Committees are duly constituted political organizations governed by the statutes of the State of New Jersey. Each county has a county committee for the Republicans and one for the Democrats. The members of the county committee are elected every two years during the Primary Election.

VII. THE COUNTY COMMITTEE CHAIRMAN VIOLATED THE CLEAR AND UNAMBIGUOUS MEANING OF *N.J.S.* 19:34-52 BY REMOVING THE PETITIONER AND HER RUNNING MATE FROM THE COLUMN, DENYING THEM THE SLOGAN, AND ENDORSING THE OPPOSITION CANDIDATES, CAUSING PETITIONER GRIEVOUS HARM.

N.J.S. 19:34-52 states that:

> No state, county or municipal committee of any political party shall prior to any primary election endorse the candidacy of any candidate for a party nomination or position.

In the instant case, the Respondent County Committee Chairman violated *N.J.S.* 19:34-52 claiming he did so under color of *N.J.S.* 19:49-2.

The County Committee in Bergen County renamed their statutory organization the Bergen County Republican Organization (or "B.C.R.O."), to the total confusion of the courts and general public. The County Committee By-Laws state that the "B.C.R.O." is a statutorily [sic] created body established pursuant to the provisions of *N.J.S.* 19:5-3. Its membership consists of all the members of the County Committee in Bergen County. The Respondent County Committee Chairman testified that he followed these By-Laws, and he acknowledged the County Committee By-Laws which spell out the selection and endorsement procedures he followed. Article II, of these By-Laws states:

> The object of this organization shall be to strengthen party effectiveness by *selecting* Republican candidates for county office and *endorsing* Republican candidates for state and federal office [and] to *endorse* and *recommend* candidates for public office. (emphasis added).

Article XII, entitled "Candidate Selection Procedure," states that:

> The provisions of this Article shall apply to the selection of candidates for nomination to county offices in the annual Primary Election and to the endorsement of *such other candidates for public office as may be deemed appropriate* by the organization.[2] (emphasis added).

Section 4 of this Article provides that "there shall be a special meeting or Convention" to implement the selection of candidates prior to the Primary Election, *"to select the candidates who shall run in the Republican column in the ensuing Primary election"*.[3] (emphasis added).

Article XII concludes:

> The Chairperson shall certify to the County Clerk, in accordance with the provisions of Title 19, those candidates who are selected or endorsed by the Convention for placement in the Republican column on the Primary ballot.

The County Committee's endorsement policy, which was carried out by its Respondent Chairman, blatantly violates *N.J.S.* 19:34-52 and grievously injured Petitioner by depriving her and her running mate of their rightful place on the Primary Ballot and use of the slogan "Republicans for Responsible Government." The endorsement of the opposition candidate was advertised to every registered Republican voter when Respondent County Clerk sent out the sample ballots, with a clear message that Petitioner and her running mate were not "Republicans

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[2] This is the section which permits the County Chairman to endorse municipal candidates.

[3] This is the enabling provision for the March 28, 1998 meeting which endorsed the Defendant County Clerk's candidacy.

for Responsible Government"; that they were not endorsed by the Republican Party – and that they were not put in the First (best) Column – making them a suspect class of quasi-Republicans in the eyes of the voters.

The County Clerk printed the sample ballots and the offending endorsements and distributed them by mail (using public funds), aiding the County Committee Chairman's violation of *N.J.S.* 19:34-52, and lent the official stamp and imprimatur of her office to the opposition candidates.

Cavanagh v. Morris Cty, Democratic Committee, 121 N.J. Super. 430 (Ch. Div. 1972), like the instant case, is a suit wherein the plaintiffs proved that the County Committee violated *N.J.S.* 19:34-52 by endorsing candidates prior to the Primary election. Cavanagh and his running mate sought a declaratory judgment. To prove their case, Cavanagh gave the Court the County Committee's By-Laws. They were candidates seeking their party's nomination in that primary to be on the Democratic ticket in the General Election. By analyzing the By-Laws, the Court ruled that the Respondent County Committee endorsed candidates prior to the Primary in violation of *N.J.S.* 19:34-52. The Court based their ruling on a reading and analysis of committee's By-Laws which were a mirror reflection of the By-Laws in the instant case. In *Cavanagh v. Morris*, the Court found that the Democratic County Committee violated *N.J.S.* 19:34-52.

The Chairman of the Bergen County Committee used color of law to "endorse" candidates in violation of *N.J.S.* 19:34-52, depriving Petitioner of a fair election and one in which the registered voters choose their candidate rather than the party boss choosing the candidates. The actions

of the Chairman of the B.C.R.O. was in fact a party "endorsement." Petitioner submits to this Court that she and the Republican voters at large were injured by the actions of the Respondent County Committee Chairman and Respondent County Clerk. Petitioner was deprived of the right to identify herself as a Republican for Responsible Government and lost her desirable position (Column One) on the ballot which caused her to lose the Primary[4] and to lose the right to be a candidate in the General Election. Further, she was unconstitutionally deprived of her right to associate with Republicans with whom she shared similar political philosophies.

VIII. *N.J.S.* 19:49-2 IS UNCONSTITUTIONAL AS WRITTEN AND APPLIED, AND THE STATE FAILED TO DEMONSTRATE A COMPELLING STATE INTEREST TO UPHOLD THE CONSTITUTIONAL VALIDITY OF THIS STATUTE WHICH WEAKENS A PARTY ORGANIZATION RATHER THAN STRENGTHENS IT.

There is no question that column position on a Primary Ballot is an important and valuable property to a candidate, as is the slogan which identifies his or her Republican loyalties. In a recent, well-publicized case, the New York courts acknowledged that being in Column One gives a candidate a significant numerical advantage over other candidates in other columns. *Koppell v. NY State Board of Elections, et al.*, 98 Civ. 4930 (SHS 1998). See

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[4] Research by Dr. Henry Bain that candidates in Column Two receive statistically significantly fewer votes than those in Column One was presented in Federal Court in *Koppell v. NY State Board of Elections, et al.*, 98 Civ. 4930 (SHS 1998), and was accepted as valid by the Judge in that case.

also July 13, 1998 *New York Times* article on the importance of the ballot position[5] (Appendix at 51a).

Petitioner advances three constitutional arguments that Column One is a valuable property right. First, the Respondent County Clerk and Respondent County Committee Chairman denied Petitioner procedural due process when the Respondents removed her from the Column One position on the Municipal Primary Election ballot and, in addition, denied her chosen Slogan. Second, *N.J.S.* 19:49-2 as written and applied is arbitrary and without procedural due process safeguards and should thus be accorded heightened scrutiny because of the burden it places on Petitioner's First Amendment Right of Association. And third, *N.J.S.* 19:49-2 which allows a "campaign manager" or "County Committee Chairman" unlimited discretion to remove a candidate from a column position and arbitrarily force a candidate to choose a different slogan, lacks a rational relationship to any legitimate governmental interest.

A. Procedural Due Process

In the trial record the Respondent County Clerk and the Respondent County Committee Chairman admitted that they met privately at the Respondent County Clerk's office and repositioned Petitioner and her running mate in a different column and told them to choose a different slogan.

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[5] The California Supreme Court in 1975 held that the plaintiff in that case was denied the equal protection of the law, when his column position on the ballot was changed. *Gould v. Grubb*, 536 P.2d 1337 (1975).

The Fourteenth Amendment commands that no state shall deprive any person of life, liberty or property without due process of law. Procedural due process involves three elements: 1) that State action must burden a protected right. *Parratt v. Taylor*, 451 U.S. 527 (1981); 2) that right must be deprived without a fair hearing either because a claimant did not receive adequate notice, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), or a reasonable opportunity to be heard. *Wolff v. McDonnell*, 418 U.S. 539 (1974).

Petitioner contends she was deprived of *property* (the column and the slogan) without notice or opportunity to be heard. Further, her *property* was taken in a closed meeting between Respondent County Clerk and County Committee Chairman. However, Respondents were silent as to how a "campaign manager" can bestow the *property* that Respondent Shotmeyer claimed was owned by the County Committee. Further, the depriving actions were taken arbitrarily and under color of *N.J.S.* 19:49-2, an unconstitutional statute that is without procedural safeguards to insure due process rights of owner-candidates.

N.J.S. 19:49-2 gives a "campaign manager" unlimited discretion to pick and choose who runs on the Republican Primary ticket. Petitioner submits that the "campaign manager" in the instant case is the alter ego of the County Committee Chairman as in *Cavanaugh v. Morris, supra.* Taking of her *property* was part of a seamless endorsement process dictated by the By-Laws of the Committee.

B. Right of Association

Petitioner and her running mate are Republicans. They chose to run as Republicans with the slogan "Republicans for Responsible Government" on the ballot.

Rejection of Petitioner's nominating petition as submitted was due to a silent set of rules or agenda known only to the Chairman of the County Committee. It also denied her political association to the ballot and to other Republicans who ran under the same slogan.

The right of political association derives from the First Amendment rights of freedom of speech, petition for redress of grievances and peaceable assembly. *Cousins v. Wigoda*, 419 U.S. 477 (1975).

> . . . freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments.

Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973). Such protection reflects the Supreme Court's recognition that "competition in ideas and governmental policies is at the core of our electoral process . . . " *Williams v. Rhodes*, 393 U.S. 23, 32 (1968) – and the right of association has greatest urgency in election matters. *CBS, Inc. v. Federal Communications Commission*, 453 U.S. 367 (1981); *Buckley v. Valeo*, 424 U.S. 1 (1976).

In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), a ballot restriction case, the Supreme Court enunciated the following test to determine whether a restriction unreasonably burdens associational rights. The Court must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that Petitioner seeks to vindicate.

The Court recognized that ballot access restrictions may burden both:

> the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. *Illinois*

State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979).

However, the Court will uphold ballot access restrictions only if they are applied even-handedly. *American Party of Texas v. White*, 415 U.S. 767 (1974); *Jenness v. Fortson*, 403 U.S. 431 (1971).

When election rules present unreasonable barriers, the Court has found constitutionally suspect burdens on the right of association. Petitioner claims that her burden is "constitutionally suspect" because the County Committee Chairman had designated her a member of a class which cannot participate in the closed door meetings of the County Committee, *id.* at 788.

C. Equal Protection

Petitioner's final challenge is based on the equal protection clause of the Fourteenth Amendment. Petitioner contends that *N.J.S.* 19:49-2 allows a "campaign manager" to create a classification of candidates for a Primary Election which neither serves a compelling state interest nor rationally relates to a legitimate state interest.

The equal protection clause's command that no state shall "deny to any person within its jurisdiction the equal protection of the laws" requires that "a statutory classification be rationally related to a legitimate state interest." *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982). The highest level of scrutiny, that is, strict scrutiny, is employed when a statute burdens personal, fundamental rights protected by the Constitution. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985).

Petitioner argues that a heightened level of scrutiny should be applied in the instant case because *N.J.S.* 19:49-2 burdens the fundamental right of association and

the fundamental right to one's property. Petitioner submits that she is a member of a "insidiously silent and unwritten" classification that merits the heightened scrutiny of this Court.

Respondent County Clerk argued at trial that *N.J.S.* 19:49-2 is rationally related to her need to format and typeset the ballot – a weak argument at best.

These arguments do not persuade that Respondent Shotmeyer used a procedurally fair process, to ascertain that Petitioner and her running mate were either: not "Republicans for Responsible Government", or Republicans committed to the same political platform as other candidates endorsed by the County Committee on March 28, 1998. By imposing silent and unwritten restrictions and means of access to associate with the Republican Party, the County Committee Chairman denied Englewood Cliffs Republican voters the opportunity to establish their own standards for their representatives through *the power of the ballot* box.[6] Petitioner submits to this Court that such restrictions and their concomitant effect on representative government do not rationally relate to any State compelling interest.

Finally, Petitioner urges that *N.J.S.* 19:49-2 which evidences restrictions on Republican Primary candidates, either by procedural due process omission, silent or vocal, written or unwritten, be held unconstitutional inasmuch as this statute serves no compelling state interest as evidenced by the trial record. Petitioner submits to this Court that it is clear that any restriction on a candidate's access to political party association decreases a voter's

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[6] New Jersey Constitution, Article I, Para. 2, "All political power is inherent in the people".

choice and consequently harms our democratic government. Further, any candidacy promoted or denied without procedural due process and equal protection by a statute permitting a taking of property without a fair hearing or forum is inimical to democratic government.

D. Conclusion

In conclusion, Petitioner would ask this Court to hold that *N.J.S.* 19:49-2 is not rationally related to any compelling interest of the State and that this statute is unconstitutional, violating the due process right of association and equal protection clauses of the Fifth and Fourteenth Amendments.

CONCLUSION

For all the reasons cited above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

DIANE SANK, *Pro Se*

Date: 12-1-98

APPENDICES

APPENDIX A

SUPREME COURT OF NEW JERSEY
M-1613 September Term 1997
46,669

DIANE SANK,

Plaintiff-Movant,

v.

STATE OF NEW JERSEY, et al.,

Defendants-Respondents.

ORDER

(Filed Sep. 02, 1998)

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to appeal is denied.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 2nd day of September, 1998.

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT OF NEW JERSEY

/s/ Stephen W. Townsend
CLERK OF THE
SUPREME COURT

APPENDIX B

ORDER ON EMERGENT APPLICATION

A-7309-97T5

DIANE SANK,

Plaintiff-Appellant,

-v-

THE STATE OF NEW JERSEY, ET AL.

Defendant-Respondent.

SUPERIOR COURT
OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.
A-7309-97T5
MOTION NO. M-8163-97
BEFORE PART: T
JUDGE(S): Long
Steinberg

EMERGENT APPLICATION FILED: 8/12/98

BY: DR. DIANE SANK

ANSWER(S) FILED:
8/13/98
8/14/98
8/14/98

BY: SUSAN C. BERGER, ESQ.
BY: JOHN CARBONE, ESQ.
BY: STEPHEN SINISI, ESQ.

REPLY ANSWER FILED: 8/18/98

BY: DR. DIANE SANK

APPEARANCE ONLY:

ORDER

(Filed Aug. 19, 1998)

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 19 DAY OF August, 1998, HEREBY ORDERED AS FOLLOWS:

EMERGENT APPLICATION	GRANTED	DENIED	OTHER
	( )	(X)	( )

MOTION TO ACCELERATE AND FURTHER RELIEF

SUPPLEMENTAL:

I hereby certify that the foregoing is a true copy of the original on file in my office

/s/ R. Emille Cox
Clerk

FOR THE COURT:

/s/ Virginia Long
VIRGINIA LONG,
P.J.A.D.

APPENDIX C

SUPERIOR COURT OF
NEW JERSEY
BERGEN COUNTY
LAW DIVISION, CIVIL PART
DOCKET NO. BER-L-5355-98
APP. DIV. NO. _____

DIANE SANK, Plaintiff, vs. STATE OF NEW JERSEY, et al., Defendants.	)	TRANSCRIPT of DECISION

Place: Bergen County
Justice Center
10 Main Street
Hackensack, NJ 07601

Date: July 23, 1998

BEFORE:
HONORABLE JAMES T. MURPHY, J.S.C.

TRANSCRIPT ORDERED BY:

DIANE SANK, (173 Charlotte Pl.,
Englewood Cliffs, NJ 07632)

APPEARANCES:

DIANE SANK, PRO SE

Plaintiff

JOHN M. CARBONE, ESQ., (Carbone & Faasse)

Attorney for Defendant, Kathleen Donovan

STEVEN P. SINISI, ESQ., (Sinisi & Sproviero)

Attorney for Defendant, Henry Shotmeyer

Transcriber Diane Van Harken
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THE COURT — Page 3
Decision

[p. 3] The Court – Decision

THE COURT: This is the SANK matter. Docket No. L-5355-98. Appearances, please.

MS. SANK: Oh. Diane Sank, pro se, Your Honor.

MR. SINISI: Steven Sinisi, Sinisi & Sproviero, for the defendant, Henry Shotmeyer.

MR. CARBONE: John M. Carbone, Carbone & Faasse, Ridgewood, New Jersey, on behalf of the Bergen County Clerk, Your Honor, Kathleen Donovan.

(Unrelated Court matter discussed)

THE COURT: This is the decision in the matter of DIANE SANK V. THE STATE OF NEW JERSEY, et al. Docket No. L-5355-98.

The decision may be somewhat unartful. The closing arguments finished sometime yesterday afternoon, and I told the attorneys and Ms. Sank to come back this morning. I expected I would have a decision. I saw no purpose

in reserving decision, as it is necessary to get a decision out as quickly as is possible, considering that I will be on vacation for the month of August, and ballots have to be prepared, I believe, sometime in September.

1) The plaintiff, Diane Sank, filed this "verified complaint in lieu of prerogative writs" after – strike that, against Kathleen Donovan as Bergen [p. 4] County Clerk, and against the Office of Bergen County Clerk, and against Henry Shotmeyer in his capacity as Chairman of the Bergen County Republican Organization (BCRO), and the Office of the Chairman of the Bergen County Republican Organization challenging the validity of the plaintiff's placement on the ballot in the republican municipal primary election held on June 2nd, 1998, and the denial of plaintiff and Peter Wen Lang Chen (phonetic) (Chen) of position in the organizational column (Column 1) with the slogan "Republicans for responsible government." Plaintiff also named the State of New Jersey as a defendant.

Plaintiff cites NJSA 19:23-18; 19:23-24; 19:34-52; 19:49-2; and 10:4-6, and also asserts denial of constitutional rights.

This Court will not impose any time bar that may exist. If there were any issues as to a time bar, this Court would consider the provisions of Rule 4:69-6C, relating to enlargement of time to apply to hear the matter on the merits because of the inherent public interest in election matters and in the interest of justice.

2) The following persons testified; Joseph Favaro, the Borough Clerk of Englewood Cliffs; Henry Shotmeyer, Chairman of the Bergen County Republican [p. 5]

Organization; and Kathleen Donovan, the Bergen County Clerk. Various exhibits were introduced into evidence, including P-1 plaintiff's brief; P-2 defendant's (Donovan's); P-3 defendant's (Shotmeyer's) brief; P-4 plaintiff's rebuttal brief; P-5 the Sank/Chen petition received by the borough clerk April 8th, 1998; P-6 the Wasik/Helvasian (phonetic) petition received by the borough clerk April 9th, 1998; P-7 republican party primary election copy; P-8 letter from the borough clerk to the county clerk dated April 16th, 1998 (except for legal conclusions).

J-1 primary election copy for Allendale; J-2 primary election copy for Emerson; J-3 primary election copy for Englewood Cliffs; J-4 primary election copy for Hasbrook Heights; J-5 primary election copy for New Milford; J-6 packet of six letters, the face letter being dated April 4th, 1998; J-7 copy of letter dated April 8th, 1998 from Chairman Shotmeyer to municipal chairman; J-8 copy of letter dated April 16th, 1998 from Mr. Shotmeyer to the county clerk.

P-10 copy of request for position on ballot dated April 7th, 1998 (Sank/Chen); P-11 copy of request for position on ballot dated April 7th, 1998 (Wasik/Helvasian); P-12 letter from Kathleen Donovan to Sank dated April 21, 1998; P-13 copy of portion of a [p. 6] sample ballot of Englewood Cliffs for June 2nd, 1998; P-14 a sample ballot for the June 3rd, 1997 primary; P-15 copy of a ballot in 1993; P-16 sample ballot for the June 7th, 1994 primary; P-17 two pages from the 1998 County Directory; P-18 copy of a July 13, 1998 New York Times article about a lawsuit in Staten Island; P-19 copy of a June 3rd, 1997

New York Times article, re the Essex County Democratic Committee.

DD-1 county level petition for primary election, June 2nd, 1998; DD-2 was marked for identification only, it was a copy of primary election. Plaintiff's objection to its being marked into evidence was sustained.

3) Based on the testimony, exhibits, submissions, stipulations, evidence, proofs – and proofs, rather, adduced I find;

A) Plaintiff was a republican candidate for office of council in the borough of Englewood Cliffs in Bergen County in the primary election on June 2nd, 1998. Plaintiff choose to move or "bracket" her name on the nominating petition with that of Peter Wen Lang Chen pursuant to NJSA 19:23-18. The Sank/Chen nominating petition was delivered to the Englewood Cliffs Municipal Clerk on or about April 8th, 1998 seeking the designation/slogan "Republicans for [p. 7] responsible government." On or about April 9th, 1998 the nominating petition of candidates Roger Wasik and Nerham Halvasian (phonetic) was delivered to the Englewood Cliffs Municipal Clerk seeking the same designation (Responsible – Republicans for responsible government).

On or about April 16th, 1998 the Municipal Clerk of Englewood Cliffs conducted a random drawing for positioning on the ballot in accordance with NJSA 19:23-24. The results of the drawing were that the Sank/Chen bracket was chosen as first.

Sometime after April 16, 1998 Henry Shotmeyer, Campaign Manager of the Bergen County Republican

Candidates, consented to the Wasik/Helvasian bracket being placed in the organizational column pursuant to NJSA 19:49-2, and so informed the County Clerk, Kathleen Donovan.

Ms. Donovan notified plaintiff by letter dated April 21, 1998:

"In accordance with Title 19:49-2 you will not be in the organizational column in the June 2nd, 1998 primary election."

"If you wish a new slogan please phone in upon receipt of this letter informing of your new slogan, with a follow-up letter by April 24th, 1998."

[p. 8] The voting machines used in the June 2nd, 1998 primary election listed the Wasik/Helvasian candidates under the organizational column (sometimes referred to as the republican line). The Sank/Chen candidates were listed in a non-organizational column (Column 2). The results of the election placed plaintiff third, thereby eliminating her candidacy for council in the November 1998 general election. Chen placed fourth.

As testified to by Henry Shotmeyer and as stipulated, at all times in question he served as both republican county chairman and as campaign manager for the county candidates for freeholder, and for the Bergen County Republican Committee line. He gave his consent to Wasik and Helvasian being placed in the organizational or republican – strike that, in the organizational or republican line with the slogan of "Republicans for a responsible government" (see J-3).

Mr. Shotmeyer served as campaign manager on a county-wide basis. His testimony is undisputed, that giving Wasik and Helvasian the republican or organizational line also gives them the slogan of "Republicans for a responsible government."

DD-1 in evidence sets forth, "County level petitions for primary election, June 2, 1998" for [p. 9] republicans. It lists three freeholder candidates, namely Barbara Chadwick (phonetic), Donald D. Wynent (phonetic), and Juan M. Domingos, Jr. (phonetic), all with the slogan of "Republicans for a responsible government." Next to their names are the initials "HS" (for Henry Shotmeyer). It also lists two other freeholder candidates, namely Sobodin Scindari (phonetic) with slogan, "A young mind for a change." And Claudia Ann Bolin (phonetic) with "no slogan." Next to those names of Scindari and Bolin is a handrawn bracket followed by the handwritten word "column" (phonetic) and the number "2."

Attached to DD-1 is a letter from Mr. Shotmeyer to the county clerk dated April 16th, 1998 (also J-8 in evidence), setting forth the following:

"As you know I serve as the campaign chairman for the Bergen County Republican Organization's candidates for the office of Bergen County Freeholder."

"Please be advised that the candidates which shall appear on the June 2, 1998 primary ballot under the line 'Republicans for responsible government' are Barbara Chadwick, Donald Wynent, and Juan M. Domingos, Jr."

J-6 in evidence is a packet of six letters, all dated April 4th, 1998, to Mr. Henry Shotmeyer, [p. 10] three of

which are from candidates seeking the office of freeholder, namely Barbara Chadwick, Donald D. Wynent, and Juan M. Domingos, Jr. Each of those letters state, in part, "I . . . hereby appoint you Henry . . . Shotmeyer as campaign manager."

It should be noted that DD-1 also lists three other candidates with the slogan of "Republicans for responsible government." They are William Pat Schuber (phonetic) for county executive, Jay Albert (phonetic) for sheriff, and Kathleen A. Donovan for county clerk. Schuber, Albert, and Donovan also wrote letters dated April 4th, 1998 (as part of J-6) to Mr. Shotmeyer stating, "I . . . hereby appoint you Henry . . . Shotmeyer as campaign manager."

B) Plaintiff alleges that the conduct of Kathleen Donovan and/or Henry Shotmeyer in denying her the organizational column was a violation of NJSA 19:23-18 (grouping of candidates); 19:23-24 (drawing for position on primary ballot procedure certification); 19:34-52 (endorsement of candidate by party a committee before primary: and 10:4-6 et seq. (the Open Public Meetings Act). She further alleges that application of NJSA 19:49-2 is unconstitutional, "as it conflicts with other state statutes violating due process rights. . . . "

[P. 11] C) NJSA 19:23-24 provides for, in relevant part, that:

"The position which the candidates and bracketed groups of names of candidates for the primary for the general election shall have, upon the primary election ballots . . . shall be determined by the county clerks . . . and excepting in counties where RS 19:49-2 applies,

the position on the primary ballots. In the case of candidates for office or party position to be filled are to be voted for by the voters of the municipality only . . . shall be determined by the municipal clerk . . . in the following manner; the county clerk or his deputy, or the municipal clerk or his deputy, as the case may be, shall, at his office, on the 47th day prior to the primary election, at 3 o'clock in the afternoon, draw from the box, as here and after described. . . . the first name drawn shall have first place, the second name drawn second place, and so on. . . . "

NJSA 19:49-2 relates to "printing official ballots, ballots in counties where voting machines are used, position of candidates' names on ballots", and provides in pertinent part, "the providing of the official ballots and the order of the precedence and arrangement of parties and of candidates shall be as [p. 12] now required by law, providing, however, that in those counties where voting machines are used the specifications for the printing of the official ballots shall be drawn by the county clerk."

"For the primary election for the general election in all counties where voting machines are or shall be used all candidates who shall file a joint petition with the county clerk or their respective – strike that, of their respective county, and who shall choose the same designation or slogan shall be drawn for position on the ballot as a unit, and shall have their names placed on the same line of the voting machine, and providing further that all candidates for municipal or party office in municipalities in counties where voting machines are or shall be used who shall file a petition with the clerk of their municipality bearing the same designation or slogan as that of the candidates filing a joint petition with the county

clerk, as aforesaid, may request that his or her name be placed on the same line of the voting machine with the candidates who have filed a joint petition with the county clerk, as aforesaid, by so notifying the county clerk of said county in writing within two days after the last day, or filing nominating petitions, and thereupon the county clerk shall forthwith notify the [p.13] campaign manager of such candidates filing a joint petition, as aforesaid, of said request, and if the said campaign manager shall file his consent in writing with the said county clerk within two days after the receipt of said notification from said county clerk, the clerk of said county shall place the name of such candidate on the same line of the voting machine on which appears the names of the candidates who have filed the joint petition, as aforesaid,. . . . "

Wasik and Helvasian complied with the provision of 19:49-2 for filing a petition bearing the same designation or slogan as the candidates filing a joint petition with the county clerk, and requesting their name be placed on the same line, triggering the consent of the campaign manager, Henry Shotmeyer, allowing for the placement of the Wasik/Helvasian names "on the same line of the voting machines on which appears the names of the candidates who have filed the joint petitions."

The contents of DD-1, together with the contents of the letters in the packet marked J-6 in evidence, satisfy the provisions of "joint petition", referred to in NJSA 19:49-2. It was also stipulated by the parties that Mr. Shotmeyer served as campaign manager for the county candidates for freeholder, and [p. 14] for the county – strike that, and for the Bergen County Republican Committee line.

As stated in QUAREMBA V. ALLAN , 67 NJ 1, 6 (1975):

"NJSA 19:49-2, by its express terms, applies 'in all counties where voting machines are or shall be used' and thus include Bergen County. It provides that candidates for offices whose petitions are required to be filed with the county clerk and who file a joint petition and choose 'the same designation or slogan' (county candidates) 'shall be drawn for position on the ballot as a unit, and shall have their names placed on the same line of the voting machines'. Candidates for municipal or party office in any of the county's municipalities whose petition filed with the municipal clerk bears the same designation or slogan, and candidates whose petitions are filed with the Secretary of State, see NJSA 19:23-6, may upon request, and if the campaign manager of the county candidates consents thereto, have his or her name placed on the same line of the voting machine with those county candidates."

The QUAREMBA court discussed the interplay between NJSA 19:23-24, which requires candidates' names appear in the organizational column, and NJSA 19:49-2, which requires the county campaign manager's consent [p. 15] for a candidate's name to appear in the organizational column. The court stated, at Page 8:

"On its face the effect of the amendment was to limit the application of the pertinent provisions of NJSA 19:23-24 to counties where paper ballots were used."

We find no substance – strike that.

"We find no substance to plaintiff's second contention that the county clerk in counties using voting machines also must comply with the provisions of NJSA 19:23-24. . . . " Id. at 13 and 14.

"There is no warrant for ignoring the express statement embodied in NJSA 19:23-24, excepting from its operation counties to which NJSA 19:49-2 applies." Id. at 14.

The QUAREMBA court, at Page 10, further discussed the conditional implication – strike that, the constitutional implications of NJSA 19:49-2:

"We are satisfied that there is no merit to any of plaintiff's constitutional arguments."

"Nothing in the challenged section inhibits any voter from voting for any person he chooses, or limits the right of any candidate to run for office. The fact that different procedures are provided governing the positioning of the names of candidates [p. 16] when voting machines are used, and when paper ballots are used, does not result in a denial either to the voters or the candidates of the equal protection of the laws." Id. at Page 11.

"Even if we were to disregard the presumption of validity which attaches to NJSA 19:49-2, it is clear that it is not invidiously discriminatory. The obvious differences in the physical make-up of the face of a voting machine and a paper ballot afford a reasonable basis for the Legislature's decision to provide different procedures governing the listing of candidates' names on the face of a voting machine than are provided for in listing such names when paper ballots are used."

The QUAREMBA court also cited with approval HARRISON V. JONES , 44 NJ Super. 456 (461-62 – strike that – 44 NJ Super. 456, 461-62 (App. Div. 1957), where the court stated:

"Plaintiff stressed the provisions of NJSA 19:23-24, indicating that 'excepting in counties where Section 19:49-2 of the revised statutes applies', the position of the primary ballots in the case of candidates for municipal office, or party position, shall be determined by a drawing to be conducted by the municipal clerk, and that the names of the candidates [p. 17] should be printed on the ballots 'in the order as determined as a result of the drawing'. A drawing was conducted by the Haledon Borough Clerk March 21, 1953, under which plaintiffs' names were drawn first, but by the very exception we have quoted from NJSA 19:23-24 the provisions of that section concerning the effect of drawings by municipal clerks are in applicable 'in counties where Section 19:49-2 applies. . . . by its terms the latter section applies to primary election for municipal or party office in counties where voting machines are used. Passaic is such a county. Therefore, Section 19:23-24 has no bearing here."

Accordingly, plaintiff's arguments relating to NJSA 19:23-24 and 19:49-2, and any constitutional issues are rejected.

D) Plaintiff's contentions relating to NJSA 19:34-52 is rejected. That statute provides:

"No state, county, or municipal committee of any political party shall, prior to any primary election, endorse the candidacy of any candidate for a party nomination or position."

That statute must be read in pari materia with NJSA 19:49-2, which specifically permits the procedure followed in this case under these circumstances.

[p. 18] The case of KAVANAUGH V. MORRIS COUNTY DEMOCRATIC COMMITTEE, 121 NJ Super. 430 (Chancery Division 1972) is not dispositive of any issue involved in this case. In that case the court stated, at Page 438:

" . . . It is hereby declared that the defendant, Morris County Democratic Party's bylaw creating a screening committee for purposes of endorsing candidates for primary elections is a violation of NJSA 19:34-52, and therefore invalid."

In that case the court also set forth, at Page 437:

"Election statutes are to be tested like all other statutes, but with a leaning to liberality in view of the great public purposes for which they are intended."

"One of these purposes is to purify the politics of the state by preventing fraud and wrongdoing in the nominating procedure."

"At one time party conventions provided the party nominees. However, because of public dissatisfaction with the political manipulation of conventions, primaries have replaced the convention procedure." (Citations omitted).

In the present case there is no claim of [p. 19] fraud, nor has there been any showing of any specific wrongdoing.

The operative facts and the issues involved in this case do not require any ruling relating to the bylaws.

E) Plaintiff's argument as to NJSA 10:4-6 et seq., relating to the Open Public Meetings Act is rejected. NJSA 10:4-8A defines a public body to mean:

"A commission, authority, board, council, committee, or any other group of two or more persons organized under the laws of this state, and collectively empowered as a voting body to perform a public governmental function effecting the rights, duties, obligations, privileges, benefits, or other legal relations of any person, or collectively authorized to expend public funds, including the Legislature.

But does not mean or include the judicial branch of the government, any grand or petty jury, any parole board, or any agency or body acting in a parole capacity, the state commission of investigation, the apportionment committee established under Article 4, Section 3 of the constitution, or any political party committee organized under Title 19 of the revised statutes."

[p. 20] This Court cannot find that the Bergen County Republican Organization is a "public body" as contemplated by this act. It has not been demonstrated that the Bergen County Republican Organization is empowered as a voting body to perform a public governmental function effecting the rights, duties, obligations, privileges, benefits, or other legal relations of any person, or collectively authorized to spend public funds. . . . "

Further, this Court cannot find that there was any meeting which sought to accomplish any "governmental

action akin to a legislative enactment." In WOODBURY DAILY TIMES COMPANY, INC. V. GLOUCESTER COUNTY SEWERAGE AUTHORITY, 151 NJ Super. 160, 161 (Law Division 1977) the court stated:

" . . . It becomes clear that it is the legislative intent of the Open Public Meetings Act that, where meetings are held at which governmental action akin to legislative enactment is to be accomplished, the enacting body's final determination, as well as the discussion of each individual member, be open to the public."

In the instant case the campaign manager, Henry Shotmeyer, simply exercised his right of consent, as provided in NJSA 19:49-2, and the county clerk [p. 21] simply performed her ministerial duties in accordance with that statute.

F) The actions taken by Henry Shotmeyer and Kathleen Donovan were statutorily authorized. Plaintiff has failed to demonstrate that any conduct or action by either of these defendants was in any way impermissible or constituted any violation.

Accordingly, a judgment is entered in favor of the defendants and against the plaintiff of no cause for action. The verified complaint is dismissed with prejudice. Any application for fees is denied.

Who will submit the appropriate –

MR. CARBONE: Your Honor, I'll prepare and submit an order.

THE COURT: Thank you, Mr. Carbone. I am returning the exhibits. This packet of exhibits, I believe, was handed to me by the plaintiff. There may be some J

exhibits – there may be some exhibits in there that actually belong to the defendants, but you're going to have to straighten that out. Also, I'm returning DD-1 to Mr. Carbone.

There's nothing else? Thank you.

MS. SANK: Your Honor, I would like to have – perhaps to have the Court keep the records so that I can make copies of them for future use.

[p. 22] THE COURT: I'm handing – no. I'm handing the copy – I'm handing the records back. You have copies. Every – every exhibit. Let me go through them. That – that envelope that's been handed back to you, that file, contains the following; P-1, 2, 3, 4, 5, 6, 7, 8; J-1, 2, 3, 4, 5, 6, 7, 8; P-10, 11, 12, 13, 14, 15, 16, 17, 18, 19; DD-1 was returned to Mr. Carbone. The Court never took possession of DD-2.

MS. SANK: I would just like to have the opportunity to make copies of all of the –

THE COURT: You can work that out with the – you probably could have gotten copies of those beforehand.

MS. SANK: I did not.

MR. CARBONE: I'll give her copies.

THE COURT: Thank you.

MS. SANK: Thank you.

MS. SANK: Thank you, Judge. That municipal appeal. Mr. Carbone?

MR. CARBONE: Yes, Your Honor?

THE COURT: When you submit the form do it under the 5 Day Rule, and submit copies – send copies to Ms. Sank and the other attorneys involved in the case, including the Deputy Attorney General. Thank you.

[p. 23] MR. CARBONE: We'll do that, Judge.

(Proceeding Concluded)

CERTIFICATION

I, Diane Van Harken, the assigned transcriber, do hereby certify that the foregoing transcript of proceedings in the Bergen County Superior Court on Videotape dated July 23, 1998, Time Index from 8:57:11 to 9:35:29, is a true and accurate record of the proceeding and is prepared in full compliance with the current Transcript Format for judicial proceedings, to the best of my knowledge and ability.

/s/ Diane Van Harken
Diane Van Harken AD/T #389 August 1, 1998
Elite Transcripts, Inc.
Bloomingdale, N.J., 07403

APPENDIX D

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
BERGEN COUNTY
DOCKET NO. L-5355-98
APP. DIV. NO. _____

DIANE SANK, Plaintiff, vs. STATE OF NEW JERSEY, et al, Defendant.	)	TRANSCRIPT of TRIAL

Place: Bergen Co. Justice Center
10 Main Street
Hackensack, NJ 07601
Date: July 30, 1998

BEFORE:

HONORABLE JAMES T. MURPHY, J.S.C.

TRANSCRIPT ORDERED BY:

DIANE SANK, (173 Charlotte Place, Englewood Cliffs, New Jersey 07632)

APPEARANCES:

DIANE SANK, PRO SE
Plaintiff

STEPHEN SINISI, ESQ., (Sinisi & Sproviero)
Attorney for the Defendant Henry Shotmeyer

JOHN M. CARBONE, ESQ., (Carbone & Faasse)

Attorney for the Defendant Kathleen Donovan

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REGARDING FINAL FORM OF ORDER 3

[p. 3] Regarding Final Form of Order

THE COURT: This is the matter of DIANE SANK V. THE STATE OF NEW JERSEY, ET AL, Docket No. L-5355-98. I have received proposed forms of final orders. The first one was submitted by Mr. Carbone to which there was an objection filed by Ms. Sank. Based upon what I see, the basis of the objection is that the proposed form of order sets forth that there was no appearance on behalf of the State of New Jersey and the proposed form of order that was submitted by Ms. Sank reads, in part, "Attorney General of the State of New Jersey, (Susan C. Berger, Esq., Deputy Attorney General) appearing.

So your objection is based upon the preliminary – the lead-in language that the Attorney General did not appear?

MS. SANK: That is right, Your Honor.

THE COURT: Well, –

MS. SANK: Because I believe she –

THE COURT: – Ms. Berger did appear on the first day which was July 21st and she was told it was up to her if she wanted to continue to appear, but I wasn't prone to compel her physical appearance.

So I will take Mr. –

MS. SANK: Your Honor –

THE COURT: – Carbone's proposed form of [p. 4] order –

MS. SANK: Your Honor –

THE COURT: Let me finish, please. I – I – I don't recall interrupting you.

MS. SANK: I'm sorry, Your Honor.

THE COURT: And I will – where it states, "by having made no appearance at the hearing", I will insert on top of that, except for the first day, July 21, 1998.

MR. CARBONE: No objection, Your Honor.

THE COURT: Now, Ms. Sank, do you want to say something?

MS. SANK: Yes, Your Honor. I'm sorry if I interrupted you because I thought you were making final statements. I believe the – the – first of all, I would like to say that I object to the form of the defendant's order. And my position with regard to the defendant's order is simple. On day one of the trial Susan Berger, Deputy Attorney General, did enter a general appearance and my review of the tapes of the trial confirm that she entered a

general appearance. She was in the courtroom during the trial. There's no question, however, that she declined to defend the Attorney General's office having made her own determination that there was no constitutional issue.

[p. 5] And Donna Kelly, Senior Deputy Attorney General had sent a letter to the Court on July 21st, 1998 reiterating that position. But I can find no authority which would allow Ms. Berger to withdraw her appearance, even in the rules of the Court, or in case law.

I submitted my order in the form that you see now because the State, I believe, continues to be a party to the suit. Whether Ms. Berger chooses to defend or not for the State, the fact that this Court ruled against my allegation is relevant to a constitutional issue is still part and parcel of this controversy.

THE COURT: Madame, I'm just simply trying to settle the form of the order.

MS. SANK: Yes.

THE COURT: That's all I'm trying to do. And what happened, happened.

MS. SANK: Well, Ms. –

THE COURT: And – and –

MS. SANK: – Berger was here –

THE COURT: Excuse me, please, she was physically here, she was here. She entered her appearance, we proceeded. We concluded for that day. And discussion came up as to whether she should come up [p. 6] the following day or had to come back the following day. I

just simply said I'm not going to compel you to physically come back. And she didn't.

So wouldn't it be accurate to – for the lead-in language to be – to read, Peter G. Verniero – strike that. And on notice to the Attorney General of the State of New Jersey, Peter Verniero by having made no appearance at the hearing to insert in there except for the first day, July 21, 1998. Isn't that accurate?

MS. SANK: I – I thought she was here more than the first day.

THE COURT: Well, then you tell me when she was here. She was here.

MS. SANK: She was here. Well, you said for the first –

THE COURT: During the course of the trial, during a portion of the trial. My recollection when she was here was the first day, July 21st. Anybody else?

MR. CARBONE: My notes show the same thing.

MS. SANK: I thought she was here the second –

THE COURT: Well, I'm going to put in here except for the first day, July 21st, 1998. If you can demonstrate to me that she was here also on another [p. 7] day, I'll put that in too, but I want to put in what accurately reflects what happened. I don't think it's of any material importance the – what you're objecting to, to be perfectly honest. But since you're raising the objection, I'll try to make this as accurate as possible.

So if there's nothing further, that's the way the order will read. Anything else?

MS. SANK: Basically, that regardless of how you settle the order, Your Honor, the constitutional issues will be raised on appeal and –

THE COURT: That's up to you.

MS. SANK: That's why I'm –

THE COURT: Now I'm trying to settle the form of the order to which you objected.

MS. SANK: Thank you, Your Honor. And regarding my letter to you –

THE COURT: Does this have anything to do with settling the form of the order because I'm about to write it in and I'm getting a little anxious to do so. I am going to write it in. Copies of that order will be made available to all of you momentarily. Is there anything else?

MS. SANK: In my letter to you, Your Honor, I ask that if practical, I would respectfully waive the [p. 8] 15-day period for review since I'm filing a motion for an emergent appeal and every day is –

THE COURT: I'm not going to waive anything. To be perfectly honest, I'm not quite sure what you're asking for.

MS. SANK: The 15-day period for review and modification of your decision.

THE COURT: 15-day period for review and modification of my decision. I – where did you get that from?

MS. SANK: Well, that's –

THE COURT: Is it in a rule some place?

MS. SANK: That's – yes, that's –

Your Honor, in the the rules governing the Court – the Rule 2:5-1, Section B within – within 15 days thereafter –

THE COURT: Excuse me, please. Section what?

MS. SANK: B.

THE COURT: C?

MS. SANK: B, as in boy.

THE COURT: Madame, I really don't think that – let me – it says this is what you have to do in filing your appeal. It's B, "notice to trial judge or agency in addition to the notice of the filing of appeal, the appellant shall mail a copy thereof with a [p. 9] copy of a Case Information Statement annexed by ordinary mail to the trial judge." Then it refers to other agencies such as Workers Compensation or Administrative Agency or officer. It says, "Within 15 days thereafter the trial judge . . . may file and mail to the parties an amplification of a prior statement, opinion, or memorandum. . . . "

So you do whatever you're supposed to do and send me a copy of whatever you're sending, which you have to do, and if I'm going to amplify my opinion, I've got to do it within 15 days. That's for me, so why would I waive

that? I don't think you understand what that means and I don't say that critically. But I'm not going to waive that.

MS. SANK: It was just in the context of my filing an emergent appeal and there being an election where they're printing ballots, that any, you know, delay along –

THE COURT: If it helps you at all, I have no expectation at all of amplifying anything. You have my decision. If that helps you at all, but I'm not going to put any waiver in there.

MS. SANK: Your Honor, I –

THE COURT: I don't know what you might say.

MS. SANK: Well, then, Your Honor, by my [p. 10] suggested final order for you included Peter Verniero and Susan Berger as part of the order and you have, in a sense, done that, but you said she appeared only one day. I really feel that she is – that I would like to have you note on your order that, really, I objected to the order for the reasons –

THE COURT: Madame.

MS. SANK: – that I've given.

THE COURT: Madame, I've heard you. You've submitted your objection. You're on the record. I've told you what I'm going to do with the order, how it's going to read. I've prepared it, I've inserted that language that I said I would insert. It now reads, "Made no appearance at the hearing." There's a caret and I've written on top of that, "except for the first day (7-21-98)" and the rest reads as it was submitted by Mr. Carbone. I've inserted the

word – the date the 30th. I've signed my name and I'm making copies available to you. The order is settled. Thank you.

MR. SINISI: Thank you.

MR. CARBONE: Thank you, Your Honor.

MS. SANK: Thank you.

THE COURT: I would ask you to wait, that's all of you, so that you can all get copies.

(Proceedings concluded)

[p. 11] CERTIFICATION

I, Gale Repasy, the assigned transcriber, do hereby certify the foregoing transcript of proceedings in the Bergen County Superior Court on Videotape dated July 30, 1998, Time Index from 9:09:27 to 9:24:59, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings as recorded to the best of my knowledge and ability.

/s/ Gale Repasy
Gale Repasy AD/T#281
Elite Transcripts, Inc. July 31, 1998
Bloomingdale, New Jersey 07403

APPENDIX E

CARBONE AND FAASSE
401 GOFFLE ROAD
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ATTORNEYS FOR DEFENDANT,
KATHLEEN A. DONOVAN

DIANE SANK, et al, Plaintiff, vs. THE STATE OF NEW JERSEY, et al, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO. BER-L-5355-98 Civil Action *FINAL ORDER*

THIS MATTER having been brought before the Court for a hearing on the application of Plaintiff, Diane Sank, appearing pro se, on notice and in the presense of Carbone and Faasse (John M. Carbone, Esq. appearing), attorneys for Defendant Kathleen A. Donovan, Bergen County Clerk, and Sinisi and Sproviero (Stephen P. Sinisi, Esq.; appearing), attorneys for Henry Shotmeyer, Chairman of the Bergen County Republican Organization, and the Bergen County Republican Organization, and on notice to the Attorney General of the State of New Jersey, Peter G. Verniero, but having made no appearance at the hearing [except for the First Day (7-21-98)] and the Court having conducted a hearing and heard the arguments of Plaintiff and counsel, and for the reasons set forth upon the record and other good cause having been shown;

IT IS on this 30th day of July, 1998;

ORDERED AND ADJUDGED as follows:

1. The Court finds no cause of action against the Defendants.

2. The within action is hereby dismissed with prejudice and without costs as to all parties; and

3. A copy hereof shall be served upon all parties by counsel for Defendant Kathleen A. Donovan within seven (7) days from the date hereof

/s/ James T. Murphy
James T. Murphy, J.S.C.

APPENDIX F

19:23-18. Grouping of candidates

Several candidates for nomination to the same office may in such petitions request that their names be grouped together, and that the common designation to be named by them shall be printed opposite their names. If two candidates or groups shall select the same designation, the secretary of state, county clerk or municipal clerks, as the case may be, shall notify the candidate or group whose petition was last filed, and such candidate or group shall select a new designation.

APPENDIX G

19:23-24. Drawing for positions on primary ballots; procedure; certification

The position which the candidates and bracketed groups of names of candidates for the primary for the general election shall have upon the primary election ballots, in the case of candidates for nomination for members of the United States Senate, Governor, members of the House of Representatives, members of the State Senate, members of the General Assembly, choice for President, delegates and alternates-at-large to the national conventions of political parties, district delegates and alternates to conventions of political parties, candidates for party positions, and county offices or party positions which are to be voted for by the voters of the entire county or a portion thereof greater than a single municipality, including a congressional district which is wholly within a single municipality, shall be determined by the county clerks in their respective counties; and, excepting in counties where R.S. 19:49-2 applies, the position on the primary ballots in the case of candidates for nomination for office or party position wherein the candidates for office or party position to be filled are to be voted for by the voters of a municipality only; or a subdivision thereof (excepting in the case of members of the House of Representatives) shall be determined by the municipal clerk in such municipalities, in the following manner: The county clerk, or his deputy, or the municipal clerk or his deputy, as the case may be, shall at his office on the 47th day prior to the primary election at three o'clock in the afternoon draw from the box, as hereinafter described, each card separately without knowledge on his part as to

which card he is drawing. Any legal voter of the county or municipality, as the case may be, shall have the privilege of witnessing such drawing. The person making the drawing shall make public announcement at the drawing of each name, the order in which same is drawn, and the office for which the drawing is made. When there is to be but one person nominated for the office, the names of the several candidates who have filed petitions for such office shall be written upon cards (one name on a card) of the same size, substance and thickness. The cards shall be deposited in a box with an aperture in the cover of sufficient size to admit a man's hand. The box shall be well shaken and turned over to thoroughly mix the cards, and the cards shall then be withdrawn one at a time. The first name drawn shall have first place, the second name drawn, second place, and so on; the order of the withdrawal of the cards from the box determining the order of arrangement in which the names shall appear upon the primary election ballot. Where there is more than one person to be nominated to an office where petitions have designated that certain candidates shall be bracketed, the position of such bracketed names on the ballot (each bracket to be treated as a single name), together with individuals who have filed petitions for nomination for such office, shall be determined as above described. Where there is more than one person to be nominated for an office and there are more candidates who have filed petitions than there are persons to be nominated, the order of the printing of such names upon the primary election ballots shall be determined as above described.

The county clerk in certifying to the municipal clerk the offices to filled and the names of the candidates to be

printed upon the primary election ballots, shall certify them in the order as drawn in accordance with the above described procedure, and the municipal clerk shall print the names upon the ballots as so certified and in addition shall print the names of such candidates as have filed petitions with him in the order as determined as a result of the drawing as above described.

APPENDIX H

19:34-52. Indorsement of candidate by party committee before primary

No state, county or municipal committee of any political party shall prior to any primary election indorse the candidacy of any candidate for a party nomination or position.

APPENDIX I

19:49-2. Printing official ballots; ballots In counties where voting machines are used; position of candidates' names on ballot

All official ballots shall be printed on clear white paper or cardboard of such form and size as will fit the ballot frames of the machines, printed in black ink in type as large as the space will reasonably permit; provided, however, that any public question which shall be placed on the ballot shall be printed in red ink and above any public question to be voted upon by the voters of the entire State there shall be printed, also in red ink, a description of the public question, which description shall not exceed six words and shall be printed in type as large as is practicable. Party nominations shall be arranged on each voting machine, either in columns or horizontal rows, the caption of the various ballots on the machines shall be so placed on the machines as to indicate to the voter what push knob, pointer, lever or other device is to be used or operated in order to vote for the candidates or candidate of his choice. The providing of the official ballots and the order of the precedence and arrangement of parties and of candidates shall be as now required by law; provided, however, that in those counties where voting machines are used, the specifications for the printing of the official ballots shall be drawn by the county clerk.

For the primary election for the general election in all counties where voting machines are or shall be used, all candidates who shall file a joint petition with the county clerk of their respective county and who shall choose the same designation or slogan shall be drawn for position on

the ballot as a unit and shall have their names placed on the same line of the voting machine; and provided further, that all candidates for municipal or party office in municipalities in counties where voting machines are or shall be used who shall file a petition with the clerk of their municipality bearing the same designation or slogan as that of the candidates filing a joint petition with the county clerk as aforesaid, may request that his or her name be placed on the same line of the voting machine with the candidates who have filed a joint petition with the county clerk as aforesaid by so notifying the county clerk of said county in writing within two days after the last day for filing nominating petitions and thereupon the county clerk shall forthwith notify the campaign manager of such candidates filing a joint petition as aforesaid of said request, and if the said campaign manager shall file his consent in writing with the said county clerk within two days after the receipt of said notification from said county clerk, the clerk of said county shall place the name of such candidate on the same line of the voting machine on which appears the names of the candidates who have filed the joint petition as aforesaid; provided, also, that any candidate filing a petition with the Secretary of State may request that his or her name be placed on the same line of the voting machine with the candidates who have filed a joint petition with the county clerk as aforesaid by so notifying the county clerk of said county in writing within two days after the last day for filing nominating petitions, and thereupon the county clerk shall forthwith notify the campaign manager of such candidates filing a joint petition as aforesaid of said request, and if the said campaign manager shall file his consent in writing with

the said county clerk within two days after the receipt of said notification from said county clerk, the clerk of said county shall place the name of such candidate on the same line of the voting machine on which appears the names of the candidates who have filed the joint petition as aforesaid.

APPENDIX J

CHAPTER 4

OPEN PUBLIC MEETINGS

10:4-6. Short title

This act shall be known and may be cited as the "Open Public Meetings Act."

Introductory Statement

Assembly, No. 1030 – L.1975, c. 231

This bill requires that the public and the press have advance notice of and the opportunity to attend most meetings, including executive sessions, of public bodies, except where the public interest or individual rights would be jeopardized. The public's right to know the process by which governmental decisions are made and to witness that process in full detail may be obstructed by needlessly barring members of the public and the press from certain policymaking meetings of public bodies. If the public and the press cannot attend, they cannot learn of many positions that are considered or taken at such meetings by individual officials serving the public. Lack of this information can lessen public confidence in governmental decisions and impair the public's function of holding officials accountable in a democracy.

Section 3 determines the scope of the act by defining 'public body,' 'meeting' and 'public business.' To be covered, a public body must be organized by law and be collectively empowered as a multi-member voting body to spend public funds or affect persons' rights. Therefore,

informal or purely advisory bodies with no effective authority are not covered. Neither are groupings composed of a public official with subordinates or advisors, such as a mayor or the Governor meeting with department heads or cabinet members who are not empowered to act by vote. Specific exemptions are provided for the judiciary, parole bodies, the State Commission of Investigation and political party organizations.

To be covered, a meeting must be open to all the public body's members, and the members present must intend to discuss or act on the public body's business. Therefore, typical partisan caucus meetings and chance encounters of members of public bodies are not covered. Specific exemptions are provided for public bodies meeting as a part of a convention and meetings where an effective majority fails to attend.

Public business, to be covered, need merely be related in some way to the public body's function or business.

Section 3 also defines the 'adequate notice' which is required for the public body's regular and special meetings. Normally, 48 hours' advance notice must be prominently posted, filed with a certain officer of the public body, and provided to two newspapers. Publication of legal notice is not required.

Section 4 prohibits meetings without adequate notice except upon a 3/4 vote of the members present where the only matters that may be discussed are matters of such urgency, that waiting to give notice would result in substantial harm to the public interest. Notice of the meeting

must be posted and provided to two newspapers as soon as possible.

Section 5 requires a statement at every meeting confirming that adequate notice was provided or if it was not provided, presenting the reasons why it was not provided. Embarrassing statements required for avoidable emergencies are intended to discourage public officials from circumventing notice requirements by deliberately waiting until matters become emergencies.

Section 6 prohibits purposely circumventing the act by failing to invite one or more members of a public body so that a meeting of a majority of a public body would not qualify under section 3b.

Section 7 provides that a public body may limit public participation in its meetings. In addition, specific topics which a public body may be permitted to discuss in private are listed. Private deliberation is permitted in cases where the public interest would otherwise be endangered or the personal privacy or guaranteed rights of individuals would be in danger of unwarranted invasion. Public bodies may meet in closed session when the matters under discussion (1) are considered confidential by federal law, state statute or court rule, (2) would jeopardize receipt of federal funds, (3) constitute an unwarranted invasion of individual privacy, (4) concern collective bargaining, (5) involve purchase lease or investment using public funds, or concern the setting of banking rates, (6) concern investigations of violations or possible violations of the law, or techniques of protecting the safety and property of the public, where disclosure of such techniques could impair such protection, (7) are

covered by the attorney-client privilege, (8) concern personnel, or (9) involve certain proceedings which could result in a civil penalty, suspension, or loss of license.

Section 8 requires that whenever a public body seeks to meet in private, it must first pass a resolution at a public meeting stating its intention to do so. The resolution must also state the general nature of the matters to be discussed and approximately when, if ever, the matters discussed can be made public.

Section 9 requires public bodies to keep comprehensible minutes on the essentials of all meetings. Minutes are not intended to be verbatim or even to include every comment made. The requirement that minutes be comprehensible is intended to include print – exclude shorthand. Minutes must be promptly available to the public, except for material covering meetings or portions of meetings closed to the public.

Section 10 provides that actions taken by a public body at a meeting not held in accordance with this act are voidable in Superior Court upon legal action brought by any person, provided that the action is filed within 45 days after the action in question has been made public. A public body may correct an action which does not comply with this act by acting anew at any time at a public meeting that does comply with this act; however such corrective action does not eliminate any individual liability for penalties under section 12. Section 10 also provides that an action such as adoption of an ordinance where there has been advance published notice of at least 48 hours shall not be voidable solely for failure to conform with notice requirements of this act.

Section 11 grants any citizen the right to apply for injunctive orders or other remedies to guarantee compliance with this act.

Section 12 provides $100.00 penalties for a first offense of knowingly violating the preceding sections of the act and penalties of up to $500.00 for subsequent offenses. Action for penalties may be brought in any county district court in the county where the alleged violation occurred, but only by appropriate officials in order to guard against harassment of members of the public body.

Under section 13, a yearly schedule and any revised schedule of any regular meetings are to be posted and distributed similarly to the 48-hour advance notice of meetings. However, unavailable information such as meeting locations or information on special meetings need not be included in such annual notices or revisions as long as they are provided in the 48-hour notice.

Section 14 requires public bodies to mail meeting notices to any member of the public and the media requesting them and authorizes charging a small fee, from which the media may be exempt, to cover the costs of notifying such parties.

10:4-7. Legislative findings and declaration

The Legislature finds and declares that the right of the public to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy formulation, and decision making of public bodies, is vital to the enhancement and proper functioning of the democratic process; that secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society, and hereby declares it to be the public policy of this State to insure the right of its citizens to have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way except only in those circumstances where otherwise the public interest would be clearly endangered or the personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion.

The Legislature further declares it to be the public policy of this State to insure that the aforesaid rights are implemented pursuant to the provisions of this act so that no confusion, misconstructions or misinterpretations may thwart the purposes hereof.

The Legislature, therefore, declares that it is the understanding and the intention of the Legislature that in order to be covered by the provisions of this act a public body must be organized by law and be collectively empowered as a multi-member voting body to spend public funds or affect persons' rights; that, therefore, informal or purely advisory bodies with no effective

authority are not covered, nor are groupings composed of a public official with subordinates or advisors, who are not empowered to act by vote such as a mayor or the Governor meeting with department heads or cabinet members, that specific exemptions are provided for the Judiciary, parole bodies, the State Commission of Investigation, the Apportionment Commission and political party organization; that to be covered by the provisions of this act a meeting must be open to all the public body's members, and the members present must intend to discuss or act on the public body's business; and therefore, typical partisan caucus meetings and chance encounters of members of public bodies are neither covered by the provisions of this act, nor are they intended to be so covered.

10:4-8. Definitions

As used in this act:

a. "Public body" means a commission, authority, board, council, committee or any other group of two or more persons organized under the laws of this State, and collectively empowered as a voting body to perform a public governmental function affecting the rights, duties, obligations, privileges, benefits, or other legal relations of any person, or collectively authorized to spend public funds including the Legislature, but does not mean or include the judicial branch of the government, any grand or petit jury, any parole board or any agency or body

acting in a parole capacity, the State Commission of Investigation, the Apportionment Commission established under Article IV, Section III, of the Constitution, or any political party committee organized under Title 19 of the Revised Statutes.

b. "Meeting" means and includes any gathering whether corporeal or by means of communication equipment, which is attended by, or open to, all of the members of a public body, held with the intent, on the part of the members of the body present, to discuss or act as a unit upon the specific public business of that body. Meeting does not mean or include any such gathering (1) attended by less than an effective majority of the members of a public body, or (2) attended by or open to all the members of three or more similar public bodies at a convention or similar gathering.

c. "Public business" means and includes all matters which relate in any way, directly or indirectly, to the performance of the public body's functions or the conduct of its business.

d. "Adequate notice" means written advance notice of at least 48 hours, giving the time date, location and, to the extent known, the agenda of any regular, special or rescheduled meeting, which notice shall accurately state whether formal action may or may not be taken and which shall be (1) prominently posted in at least one public place reserved for such or similar announcements, (2) mailed, telephoned, telegrammed, or hand delivered to at least two newspapers which newspapers shall be designated by the public body to receive such notices because they have the greatest likelihood of informing

the public within the area of jurisdiction of the public body of such meetings, one of which shall be the official newspaper, where any such has been designated by the public body or if the public body has failed to so designate, where any has been designated by the governing body of the political subdivision whose geographic boundaries are coextensive with that of the public body and (3) filed with the clerk of the municipality when the public body's geographic boundaries are coextensive with that of a single municipality, with the clerk of the county when the public body's geographic boundaries are coextensive with that of a single county, and with the Secretary of State if the public body has Statewide jurisdiction. For any other public body the filing shall be with the clerk or chief administrative officer of such other public body and each municipal or county clerk of each municipality or county encompassed within the jurisdiction of such public body. Where annual notice or revisions thereof in compliance with section 13 of this act[1] set forth the location of any meeting, no further notice shall be required for such meeting.

10:4-15. Proceeding in lieu of prerogative writ to void action at nonconforming meeting; parties; limitation; corrective or remedial action

a. Any action taken by a public body at a meeting which does not conform with the provisions of this act

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[1] Section 10:4-18.

shall be voidable in a proceeding in lieu of prerogative writ in the Superior Court, which proceeding may be brought by any person within 45 days after the action sought to be voided has been made public; provided, however, that a public body may take corrective or remedial action by acting de novo at a public meeting held in conformity with this act and other applicable law regarding any action which may otherwise be voidable pursuant to this section; and provided further that any action for which advance published notice of at least 48 hours is provided as required by law shall not be voidable solely for failure to conform with any notice required in this act.

b. Any party, including any member of the public, may institute a proceeding in lieu of prerogative writ in the Superior Court to challenge any action taken by a public body on the grounds that such action is void for the reasons stated in subsection a. of this section, and if the court shall find that the action was taken at a meeting which does not conform to the provisions of this act, the court shall declare such action void.

APPENDIX K

THE NEW YORK TIMES METRO

MONDAY, JULY 13, 1998

Political Notebook

Candidate is Suing to Change Rules for Ballot Position

By JONATHAN P. HICKS

Just as top billing carries a certain cachet in movies, it holds significance in politics, contends G. Oliver Koppell, the former New York Attorney General who is seeking the Democratic nomination for his old job.

Mr. Koppell, who was defeated in a four-way Democratic primary in 1994 by Karen S. Burstein, is to file a lawsuit in United States District Court in Manhattan this morning to try to change the way the state places candidates' names on the ballot.

Under state election law, placement on the ballot in statewide primary contests is determined by lot. If a candidate wins that lottery and receives the top spot on the ballot, that name appears at the top of every ballot throughout the state, except those in New York City, where the order of candidates' names is rotated. In that method, each candidate is at the top of the ballot in about an equal number of election districts.

Mr. Koppell, who this year is again in a four-way race for the Democratic nomination for Attorney General, is asking the court to order the state's Board of Elections to adopt the system used in New York City. The primary election will be held Sept. 15.

In the documents submitted by Mr. Koppel, he cites findings by Henry Bain, a Maryland political scientist who several years ago researched the impact of ballot placement. Mr. Bain's study suggested that in elections for positions that were not the subject of widespread attention in the news media, many voters select the candidates whose names appear first on a ballot.

A candidate who appears in the first position, Mr. Bain contended, has an advantage of three to four percentage points of the vote. Many politicians in New York suggest that the figure is even higher, as much as 10 percentage points in a crowded race.

"The current system – outside of the city of New York – is substantially unfair," Mr. Koppell said. "Because it is now simply a question of who is lucky rather than what system is fair. We have analyzed primary results, and we found that uniformly, the person in first position did better than the others. It may well have made a difference in my defeat In the 1994 primary."

In that four-way race, Ms. Burstein received 31 percent of the vote and Mr. Koppell came in second, with 29 percent.

Mr. Koppell has a reason to feel especially strongly about the ballot placement issue: His name appeared last on the ballots outside New York City in that primary.

Mr. Koppell said his suit seeks to change ballot position rules for all elected offices in the state. "We're looking for this change to apply to every race, every office," Mr. Koppell said. "We're not seeking just to make my race fair, although that's my ultimate interest."

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98-1129

NO._____

Supreme Court, U.S.
FILED
JAN 4 1999
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

DIANE SANK AND ALL OTHERS,
SIMILARLY SITUATED,
PETITIONER,

V.

THE STATE OF NEW JERSEY, ET AL.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On or about June 8, 1998, Petitioner, Diane Sank ("Petitioner") filed her initial Complaint with the Superior Court of New Jersey, Law Division, Bergen County, seeking, inter alia, nullification of the primary election held on June 2, 1998 and ordering a "New Republican Primary Election within 30 days of said Court decision at no cost to the Borough of Englewood Cliffs, New Jersey, with Petitioner and her running mate Peter Chen in Column One, with the 'Republicans for Responsible Government' designation (slogan) . . ." Petitioner seeks a "new" primary election, in compliance with the election laws of the State of New Jersey, in order to purportedly restore Petitioner's constitutional rights of due process and equal treatment under law.

Subsequently, pursuant to an Order entered by the trial court on June 19, 1998, Petitioner served a copy of her Amended Complaint in Lieu of Prerogative Writ (sic) upon counsel to Respondent, Henry Shotmeyer ("Respondent Shotmeyer") on or about June 22, 1998, and then served her Trial Brief in Support of Amended Complaint on July 7, 1998. Petitioner subsequently served her Supplemental Trial Brief in Support of Amended Complaint on July 9, 1998, two days after the deadline set forth the Court's June 19, 1998 Order.

Respondents Donovan and Shotmeyer filed their trial briefs in opposition to the relief sought by Petitioner on July 7, 1998 and July 13, 1998, respectively.

The Petitioner alleges, inter alia, that Respondents Shotmeyer and Kathleen Donovan (hereinafter "Respondent Donovan") violated certain New Jersey election laws, including N.J.S.A. 19:23-24 and N.J.S.A. 19:49-2, pertaining to the drawing for positions on primary ballots and position of candidates' names on ballots, respectively.

On July 21, 22 and 23, 1998, a trial was held before the Honorable James T. Murphy, J.S.C. After hearing Petitioner's case, the trial court dismissed Petitioner's Amended Complaint on July 23, 1998. A final order was entered on July 30, 1998.

On August 10, 1998, Petitioner filed a Notice of Appeal with the Superior Court of New Jersey, Appellate Division, requesting that the matter be heard as an emergent appeal. On August 13, 1998, with the Appellate Division's permission, the Trial Brief of Defendant, Henry Shotmeyer was submitted to the Appellate Division in lieu of a more formal appellate brief. Petitioner's application for emergent relief was denied, without opinion, by the Appellate Division on August 19, 1998.

On August 24, 1998, Petitioner filed a motion for leave to appeal from the Appellate Division's denial of her request for

emergent relief before the New Jersey Supreme Court. On September 2, 1998, Petitioner's motion was denied by the New Jersey Supreme Court, without opinion, giving rise to Petitioner's instant Petition for a Writ of Certiorari.

B. BACKGROUND

The operative, relevant facts relating to Petitioner's attempt to re-write Title 19 of the New Jersey Statutes consist of the following and are substantially not in dispute. Succinctly stated, Petitioner sought the nomination for councilperson in the Borough of Englewood Cliffs, County of Bergen, State of New Jersey in the 1998 Republican primary, ostensibly pursuant to N.J.S.A. 19:23-1, et seq. Petitioner was not the only candidate aspiring to the office of councilperson in that primary. Petitioner bracketed herself with Peter Wen Liang Chen, another candidate, for the position of Englewood Cliffs' councilperson. Opposing Petitioner and Peter Wen Liang Chen in the Republican primary were Roger Wasik and Nurhan Helvacian.

N.J.S.A. 19:49-2 provides, in pertinent part, as follows:

> ". . For the primary election for the general election in all counties where voting machines are or shall be used, all candidates who shall file a joint petition with the county clerk of their respective county and who shall choose the same designation or slogan shall be drawn for position on the ballot as a unit and shall have their names placed on the

same line of the voting machine; and provided further, that all candidates for municipal or party office in municipalities in counties where voting machines are or shall be used who shall file a petition with the clerk of their municipality bearing the same designation or slogan as that of the candidates filing a joint petition with the county clerk as aforesaid, may request that his or her name be placed on the same line of the voting machine with the candidates who have filed a joint petition with the county clerk as aforesaid by so notifying the county clerk of said county in writing within two days after the last day for filing nominating petitions and thereupon the county clerk shall forthwith notify the campaign manager of such candidates filing a joint petition as aforesaid of said request, and if the said campaign manager shall file his consent in writing with the said county clerk within two days after the receipt of said notification from said county clerk, the clerk of said county shall place the name of such candidate on the same line of the voting machine on which appears the names of the candidates who have filed the joint petition as aforesaid; provided, also, that any candidate filing a petition with the Secretary of State may request that his or her name be placed on the same line of the voting machine with the candidates who have filed a joint petition with the county clerk as aforesaid by so notifying the county clerk of said county in writing within two days after the last day for filing nominating petitions, and thereupon the county clerk shall forthwith notify the campaign manager of such candidates filing a joint petition as aforesaid of said request, and if the said campaign

> manager shall file his consent in writing with the said county clerk within two days after the receipt of said notification from said county clerk, the clerk of said county shall place the name of such candidate on the same line of the voting machine on which appears the names of the candidates who have filed the joint petition as aforesaid."

In accordance with the foregoing statute, the campaign manager of the Bergen County Republican candidates for county-wide positions, is vested with the authority to determine who will run on the county/organizational line. Respondent Henry Shotmeyer serves in the capacity as campaign manager. (July 21, 1998 Trial Transcript 63-6, July 22, 1998 Trial Transcript 85-3)[1]

As a consequence, municipal candidates, seeking the same "designation" or "slogan" on a ballot as the county-wide candidates, shall control the line through a campaign manager with regard to candidates filing a joint petition. Thus, all persons who appear on the "line" and/or "column" are permitted in that column, utilize the slogan, with the permission of the campaign manager, in this case, Respondent Shotmeyer. (July 22, 1998 Trial Transcript 85-3)

---

[1]Petitioner's Appendices fail to provide this Court with a complete record of this matter, as required by Supreme Court Rule 14. Respondent Shotmeyer relies on statements in the record, which has not been furnished by Petitioner.

On April 21, 1998, Respondent Shotmeyer identified the candidates who were to be placed within the "organizational" or "county" column. Subsequently, the Bergen County Clerk, Respondent Donovan, notified Petitioner that the organizational column was given to others, ostensibly in compliance with N.J.S.A. 19:49-2. The primary election was conducted on June 2, 1998. Petitioner, despite notification, failed to institute suit challenging, as she does here, her placement and that of her running mate on the ballot, apparently content to wait for the returns and assess her status after the votes were counted.

Petitioner filed her initial complaint on June 8, 1998, in actuality 48 days from April 21, 1998, the date when the actions occurred about which Petitioner complains. Petitioner subsequently filed her Amended Complaint in Lieu of Prerogative Writ (sic) upon counsel to Respondent, Henry Shotmeyer ("Respondent Shotmeyer") on or about June 22, 1998.

On July 21, 22 and 23, a trial was held during which the trial court found as follows:

> (i) At all relevant times, Respondent Shotmeyer served as the campaign manager for the county-wide Republican candidates. (July 23, 1998 Trial Transcript 8-10)
>
> (ii) On or about April 8, 1998, Petitioner's nominating petition was delivered to the Englewood Cliffs Municipal

Clerk, seeking the designation "Republicans for Responsible Government." (July 23, 1998 Trial Transcript 6-22)

(iii) On or about April 9, 1998, the nominating petition of candidates Roger Wasik and Nurhan Helvacian was delivered to the Englewood Cliffs Municipal Clerk, seeking the same designation. (July 23, 1998 Trial Transcript 7-1)

(iv) On or about April 16, 1998, the Municipal Clerk of Englewood Cliffs conducted a random drawing for ballot position, the results of which were that Petitioner and her running mate were chosen first.

(v) Sometime after April 16, 1998, Respondent Shotmeyer consented to Roger Wasik and Nurhan Helvacian being placed in the "organizational" column. (July 23, 1998 Trial Transcript 7-12)

(vi) Roger Wasik and Nurhan Helvacian's filing of a petition, seeking the same slogan as Petitioner and her running mate, triggered the consent of campaign manager, Respondent Shotmeyer, pursuant to N.J.S.A. 19:49-2, which allowed Respondent Shotmeyer to place the names of Roger Wasik and Nurhan Helvacian "on the same line of the voting machines on which appears the name of the

candidates who have filed joint petitions." (July 23, 1998 Trial Transcript 13-10)

(vii) The listing of county-level petitions filed for the June 2, 1998 primary (Trial Exhibit DD-1), together with the contents of the letters in the packet marked J-6 in evidence (letters from the county-wide Republican candidates designating Respondent Shotmeyer as campaign manager) satisfied the provisions relating to "joint petitions" referred to in N.J.S.A. 19:49-2. (July 23, 1998 Trial Transcript 13-20)

After hearing Petitioner's case, the trial court dismissed Petitioner's Amended Complaint on July 23, 1998. A Final Order, after hearing, was entered on July 30, 1998. As set forth above, on August 10, 1998, Petitioner filed a Notice of Appeal with the Appellate Division, requesting that the matter be heard as an emergent appeal, which request was denied on August 19, 1998. On August 24, 1998, Petitioner filed a motion for leave to appeal from the Appellate Division's denial of her request for emergent relief before the New Jersey Supreme Court, which motion was denied on September 2, 1998.

ARGUMENT

I. REVIEW OF THIS MATTER BY THE UNITED STATES SUPREME COURT IS LIMITED TO THE CONSTITUTIONAL ISSUES, IF ANY, RAISED BY PETITIONER.

In her Statement of Jurisdiction, Petitioner states that the jurisdiction of this Court rests and is invoked under 28 U.S.C. § 1257(a), which states as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by a writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." (emphasis added.)

28 U.S.C. § 1257(a) clearly defines the parameters of this Court's review of final judgments or decrees rendered by the highest court of a State. Review is limited to instances where the validity of a State statute is drawn into question on the grounds that it is unconstitutional. See, Reich v. City of Freeport, 388 F. Supp. 953 (D.C. Ill. 1974), aff'd 527 F. 2d 666 (1974); see also,

U.S. ex rel. Pascal v. Burke, 90 F. Supp. 869 (D.C. Pa. 1950).

In her Petition, however, Petitioner goes to great lengths to describe the alleged violations of New Jersey election laws and the New Jersey Open Public Meetings Act by Respondents Shotmeyer and Donovan, all of which are issues determined under state, and not federal, law. In fact, the only ostensible federal question raised by Petitioner is in the last point of her Petition where she questions the constitutionality of one section of the New Jersey election statutes.

With respect to Respondent Shotmeyer, the issues raised by Petitioner are issues which have been properly decided by the New Jersey Courts in accordance with New Jersey State law, and thus, are not properly before this Court.

II. PETITIONER HAS FAILED TO PROPERLY APPLY TO THIS COURT FOR AN EXTRAORDINARY WRIT, AND AS SUCH HER THIS CASE SHOULD NOT BE DEEMED AS AN APPLICATION FOR AN EXTRAORDINARY WRIT.

In Point II of her Petition, Petitioner contends that her petition satisfies the requirements for an "Extraordinary Writ", pursuant to 28 U.S.C. § 1651(a), which states:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Despite her contentions, Petitioner concedes that she has failed to properly apply for an "Extraordinary Writ" pursuant to the Supreme Court Rules.

Specifically, Supreme Court Rule 20 governs the issuance of Extraordinary Writs authorized by 28 U.S.C. § 1651. As stated in Rule 20, issuance of such writs is "not a matter of right, but of discretion sparingly exercised." It must be shown that the writ "will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or in any other court." A petition seeking an extraordinary writ must be prefaced by a motion for leave to file

for such a writ. See, Supreme Court Rule 20.2. The requirements for filing such a motion are clearly and unambiguously set forth in Rule 20.2.

Although Petitioner concedes at the outset of her argument that she has not properly filed for an Extraordinary Writ, she requests that her case be given consideration "as representative of a situation akin to Rule 20: Extraordinary Writ".

Accordingly, Petitioner should not be permitted to disregard the process established for applying for an Extraordinary Writ, pursuant to 28 U.S.C. § 1651 and Supreme Court Rule 20, and then simultaneously request that this Court give her case the same consideration as an Extraordinary Writ.

III. THE EQUITABLE DOCTRINES OF WAIVER, ESTOPPEL AND LACHES BAR PETITIONER FROM THE RELIEF SOUGHT.

In Point III of her Petition, Petitioner provides various citations of cases which were heard by the New Jersey Superior Court, Appellate Division and New Jersey Supreme Court on emergent or accelerated bases. While Respondent Shotmeyer does not dispute the ability of the New Jersey courts to hear emergent appeals, Petitioner fails to provide any reasons as to why her case merits an emergent appeal.

To the contrary, the facts of this case indicate that Petitioner stood idly by during the ballot positioning process. Where has the Petitioner been since she became aware, obviously before the primary election was held, of her position on the ballot? Apparently, Petitioner was content to wait and see how the primary election would turn out before she decided to take issue with the ballot configuration and line on which she ultimately appeared. Since Petitioner seeks equity, Petitioner must "do" equity. See, Morsemere Federal Sav. & Loan Ass'n v. Nicolaou, 206 N.J. Super. 637 (App. Div. 1986); see also, Local 478 Trucking and Allied Industries Pension Fund v. Jayne, 778 F. Supp. 1289 (D.N.J. 1991). Equity is to aid the vigilant and not to reward parties who engage in "spectator" conduct. See, Goodyear Tire and Rubber Co. v. Kin Properties, Inc., 276 N.J.

Super. 96 (App. Div. 1994), cert. den., 139 N.J. 290 (1995). The Petitioner waited to see if she would benefit from the election, and is only before the Court now because she lost the election and wants to change the end result, after the will of the electorate has been expressed. It is the safe assumption that Petitioner would not have sought relief had she won the election. The Petitioner was not vigilant when she chose to sit on her hands at the time the ballots were first configured; accordingly, she should not be heard now to complain.

IV. THE NEW JERSEY COURTS CORRECTLY HELD THAT RESPONDENT SHOTMEYER ACTED PURSUANT TO THE PROTOCOL PRESCRIBED IN N.J.S.A. 19:49-2, THEREBY BARRING THE RELIEF SOUGHT BY PETITIONER.

Petitioner also asserts that Respondent Shotmeyer exceeded his statutory authority by designating candidates other than the Petitioner to appear on the "organizational line", thereby allegedly violating New Jersey election laws and causing Petitioner irreparable harm by denying her a fair election. However, the relevant sections of Title 19 of the New Jersey Statutes actually operate to defeat Petitioner's allegations.

It is respectfully submitted that Petitioner's allegations with respect to Respondent Shotmeyer are based on the erroneous thesis that the municipal clerk's drawing for positions on the primary ballot is immutable. In fact, Petitioner simply ignores Respondent Shotmeyer's status as campaign manager and the protocol for ballot designation embodied in N.J.S.A. 19:49-2. [July 21, 1998 Trial Transcript 63-6, July 22, 1998 Trial Transcript 84-1 (referring to Trial Exhibit J-6)]

It is well settled law that the County Clerk is afforded wide discretion in setting up the ballot, and courts should not interfere with the exercise of that discretion unless it is clearly unreasonable. Quaremba v. Allan, 128 N.J. Super. 570 (App. Div.

1974); see also Farrington v. Falcey, 96 N.J. Super. 409 (App. Div. 1967). Furthermore, the New Jersey Supreme Court has held that "[c]ourts are reluctant to interfere in intra-party controversies in absence of a violation of a controlling statute or infringement of a clear legal right." Rogers v. State Committee of Republican Party, 96 N.J. Super. 265, 271 (1967); citing Deamer v. Jones, 42 N.J. 516, 520 (1964); see also O'Neill v. Lerner, 154 N.J. Super. 317, 325 (1977). Here, the clear legal and time-settled rights are reposed with Respondents Donovan and Shotmeyer.

The New Jersey Supreme Court in Deamer, supra., held that statutes relating to the organization of a political party "were not intended to create pervasive regulation of intra-party operations and procedures." Deamer at 521. "In becoming the arbiters of political strife, the courts would lose their neutral status as the upholders of the law." Cucci v. Introcaso, 218 N.J. Super. 421, 426 (1986); also citing Deamer at 521.

With respect to Petitioner's equal protection claims, in Quaremba, the New Jersey Supreme Court recognized that grouping candidates could result in giving certain candidates a preference, yet the Court upheld the constitutionality of N.J.S.A. 19:49-2, stating:

> "it affords no basis for invalidating as unreasonable the legislative determination that whatever the effect on an unaffiliated candidate, the public

> interest is better served by permitting a grouping of candidates having common aims or principles and authorizing those candidates 'to have this fact brought to the attention of the voter in a primary election with the additional effectiveness produced by alignment of their names on the machine ballot. . ." citing, Harrison v. Jones, 44 N.J. Super 456 (App. Div. 1957).

Quaremba v. Allan, 67 N.J. 1 (1975).

The Court in Quaremba also discussed Farrington v. Falcey, 96 N.J. Super. 409 (App. Div. 1967), where it appeared that the campaign manager for a group of Democratic candidates for county office had consented to the affiliation with that group of two candidates for the Democratic nominations for State Senators. The campaign manager had refused Farrington's request for such affiliation, who also was a candidate for nomination as a State Senator. The trial court in Farrington ordered the county clerk to place Farrington's name on the same line as the group. The Appellate Division, held that N.J.S.A. 19:49-2 barred the relief granted by the trial court and that even if the county clerk had the discretion to grant Farrington's request, it was not an abuse of power to deny such a request.

In this case, N.J.S.A. 19:49-2 permitted Respondent Shotmeyer, in his role as campaign manager, to "file his consent" with regard to the "organizational" line. (July 21, 1998 Trial

Transcript 63-6) Accordingly, Respondent Shotmeyer, acting in that capacity, and in accordance with the protocol set forth by N.J.S.A. 19:49-2, designated candidates other than Petitioner (specifically, Roger Wasik and Nurhan Helvacian) to appear on the "organizational" line, and thus, to utilize the slogan "Republicans for Responsible Government". The Petitioner was subsequently placed in the appropriate column and accordingly notified by Respondent Donovan.

The Petitioner's argument that Respondent Shotmeyer did not possess documentation from municipal candidates, appointing him as their campaign manager is irrelevant. Pursuant to N.J.S.A. 19:49-2, Respondent Shotmeyer may, as campaign manager for the county-wide Republican candidates, provide his consent to municipal candidates who seek placement in the "organizational" column, along with those candidates who have filed "joint petitions" (in this case, the county-wide candidates). The trial court found that the listing of county level petitions filed for the June 2, 1998 primary, together with the packet of letters from the county-wide Republican candidates designating Respondent Shotmeyer as campaign manager, satisfied the provisions relating to "joint petitions" referred to in N.J.S.A. 19:49-2. (July 23, 1998 Trial Transcript 13-20) Respondent Shotmeyer communicated his consent to place Roger Wasik and Nurhan

Helvacian in the "organizational" column with the candidates who filed "joint petitions" (the county-wide candidates), in accordance with the statute.

At all relevant times, both Respondents Donovan and Shotmeyer acted within the boundaries prescribed by the statute. Accordingly, the trial court's findings should not be disturbed unless they are supported by relevant and credible evidence. Fagliarone v. Twp. of North Bergen, 78 N.J. Super. 154,155 (App. Div. 1963); citing, Weiss v. I. Zapinksy, Inc., 65 N.J. Super. 351, 357 (App. Div. 1961).

V. PETITIONER'S RELIANCE ON THE OPEN PUBLIC MEETINGS ACT, N.J.S.A. 10:4-6, ET SEQ., IS THOROUGHLY MISPLACED AND IMPROPER, THEREBY BARRING PETITIONER'S REQUEST FOR RELIEF UNDER THE ACT.

In Point VI of her Petition, Petitioner asserts that Respondents Shotmeyer and Donovan violated the Open Public Meetings Act, N.J.S.A. 10:4-6, et seq., when Respondent Shotmeyer met with Respondent Donovan to communicate his consent with regard to the "organizational" line.

N.J.S.A. 10:4-7 defines the right of the public with respect to public meetings as follows:

> "the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way except only in those circumstances where otherwise the public interest would be clearly endangered or the personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion." (emphasis added)

N.J.S.A. 10:4-8 defines a public body as follows:

> "'Public body' means a commission, authority, board, council, committee or any other group of two or more persons organized under the laws of this State, and collectively empowered as a voting body to perform a public governmental function

> affecting the rights, duties, obligations, privileges, benefits, other legal relations of any person, or collectively authorized to spend public funds including the Legislature." (emphasis added)

In this case, Respondent Shotmeyer met with Respondent Donovan to indicate his consent with regard to candidates appearing on the "organizational" line, in accordance with his statutorily prescribed duties as campaign manager for the county-wide candidates. The Petitioner fails to recognize that Respondents Shotmeyer and Donovan did not, individually or collectively, constitute a "public body" as contemplated by the Open Meetings Act. Clearly, Respondents Shotmeyer and Donovan were not "collectively empowered as a voting body", and therefore, the Open Public Meetings Act simply does not apply to this matter.

VI. RESPONDENT SHOTMEYER ACTED IN ACCORDANCE WITH HIS DUTIES AS THE CAMPAIGN MANAGER FOR REPUBLICAN COUNTY-WIDE CANDIDATES, AND THEREFORE, HIS ACTIONS DID NOT CONSTITUTE AN IMPROPER ENDORSEMENT OF ANY CANDIDATE PRIOR TO THE PRIMARY ELECTION BY A POLITICAL PARTY OR COMMITTEE.

In Point VII of her Petition, Petitioner contends that Respondent Shotmeyer improperly endorsed a candidate prior to the primary election, in violation of N.J.S.A. 19:34-52. Succinctly stated, the Petitioner alleges that by affording the "organizational" line to candidates Nurhan Helvacian and Roger Wasik, Respondent Shotmeyer effectively endorsed their candidacies, in violation of N.J.S.A. 19:34-52. However, aside from pointing out that Respondent Shotmeyer is the Chairman of the Bergen County Republican Organization and the campaign manager for the county-wide Republican candidates, Petitioner fails to support her allegations of illegal endorsement.

The Petitioner repeatedly fails to recognize that Respondent Shotmeyer was acting in accordance with his statutorily (N.J.S.A. 19:49-2) prescribed duties as campaign manager when he identified the candidates to appear in the "organizational" column. (July 21, 1998 Trial Transcript 63-6, July 22, 1998 Trial Transcript 85-3) At no time did Respondent

Shotmeyer endorse any candidate in his capacity as the Chairman of the Bergen County Republican Organization. The Petitioner has failed to demonstrate any legally incorrect conduct on the part of Respondent Shotmeyer. Accordingly, Petitioner's lengthy description of the similarities between the Bergen County Republican Organization and the Republican County Committee on appeal is irrelevant, since Respondent Shotmeyer acted within the scope of his statutory duties, as the campaign manager for the county-wide Republican candidates.

VII. STATUTES RELIED UPON BY PETITIONER SUCH AS N.J.S.A. 19:34-52 HAVE BEEN FOUND TO BE VIOLATIVE OF THE FIRST AMENDMENT, AND THEREFORE, UNCONSTITUTIONAL.

Statutes such as N.J.S.A. 19:34-52, which prohibit political parties from endorsing candidates prior to primary elections, have been found to be violative of the First Amendment, and therefore, unconstitutional. For example, in San Francisco County Democratic Central Committee, et al. v. March Fong Eu, et al., 826 F.2d 814 (9th Cir. 1987), the United States Court of Appeals for the Ninth Circuit held that Section 11702 of the California Election Code, which banned pre-primary endorsements by political parties, violated the First Amendment. The Ninth Circuit held that "[b]ecause section 11702 prohibits political speech, the inviolability of which rests at the core of the First Amendment . . . we must subject the section to strict scrutiny." Id. at 833. In applying the "strict scrutiny" test, the Ninth Circuit set forth that "[f]inally, 'the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving' its interests". Id. at 834; citing Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, 540 (1980). The State of California, in March Fong Eu, asserted that the ban on endorsements protected political parties from internal

factionalism and protected party members from undue influence when they voted in the primary elections. The Ninth Circuit went on to reject both of the arguments offered by the government, holding that "[p]olitical parties are entitled to decide for themselves whether making preprimary endorsements creates disruption that hurts the parties' chances in the general election." Id. at 834. The Ninth Circuit also held that "[w]e cannot accept the State's claim that denying the voters access to the views of party leadership somehow enhances their First Amendment rights." Id. at 835. In striking down the statute, the Ninth Circuit stated: "Prohibiting the governing body of a political party from supporting some candidates and opposing others patently infringes both the right of the party to express itself freely and the right of the party members to an unrestricted flow of political information." Id.

While Respondent Shotmeyer recognizes that the constitutionality of N.J.S.A. 19:34-52 is not at issue in this case, it is important to note that the statute, so heavily relied upon by the Petitioner, suffers from the same constitutional infirmities of a sister-state's comparable statute held unconstitutional by the United States Court of Appeals for the Ninth Circuit.

In this case, the county-wide Republican candidates designated Respondent Shotmeyer, Chairman of the Bergen

County Republican Organization, to serve as their campaign manager. (July 21, 1998 Trial Transcript 63-6) Respondent Shotmeyer subsequently identified which candidates would appear in the "organizational" column in accordance with his statutorily (N.J.S.A. 19:49-2) prescribed duties as campaign manager, and not as Chairman of the Bergen County Republican Organization. Therefore, the county Republican party did not endorse any candidates when Respondent Shotmeyer acted as the campaign manager; indeed the party was not implicated at all.

VIII. PETITIONER HAS FAILED TO OVERCOME THE PRESUMPTION OF VALIDITY THAT ATTACHES TO THE ACTIONS OF PUBLIC OFFICIALS.

A presumption of validity attaches to the actions of public officials. That presumptive validity is justified by the fact that public officials generally act within the powers granted to them and do so properly. See, Southern Burlington County N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158 (1983). Public officials are assumed to properly perform their respective functions, and good faith in public officials is to be presumed. See, Matter of D.J.M., 158 N.J. Super. 1 (App. Div. 1992), cert. den., 130 N.J. 601 (1992).

In this case, Respondents Shotmeyer and Donovan were, at all relevant times, acting within their statutorily prescribed duties, and as such the validity of such actions is to be presumed.

CONCLUSION

For the foregoing reasons, the Petitioner's Petition for a Writ of Certiorari should be denied.

SINISI & SPROVIERO
Attorneys for Respondent,
Henry Shotmeyer

By:
Stephen P. Sinisi

DATED: December 31, 1998

(3)

Supreme Court, U.S.
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No. 98-1129

In The

Supreme Court of the United States

October Term, 1998

DIANE SANK,

Petitioner,

v.

NEW JERSEY, ET AL.,

Respondents.

On Petition for a Writ of Certiorari To the Supreme Court of the State of New Jersey

REPLY BRIEF FOR PETITIONER

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POINT I CONSTITUTIONAL VALIDITY OF *N.J.S.A.* 19:49-2 IS AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE AND IS PROPERLY BEFORE THIS COURT BECAUSE AS THE STATUTE IS WRITTEN AND APPLIED, IT IS REPUGNANT TO THE FEDERAL CONSTITUTION." 28 *U.S.C.* §1257(a).[1]

The Respondent, in Point I of his brief, submits to this Court that the constitutional issues presented by the Petitioner were disposed of by the New Jersey courts using State, not federal law, and are therefore not properly before this Court. *This is not so*. The New Jersey courts did not resolve the constitutional issues on independent and adequate State grounds. Instead the appellate court and State Supreme Court, both *without opinions*, denied the Petitioner's motions for emergent relief. Both motions argued that *N.J.S.A.* 19:49-2 was unconstitutional. At trial, the judge rejected the Petitioner's arguments regarding New Jersey's election laws and "any constitutionality issues." (July 28, 1998 Trial Transcript 16-13 to 15). The Petitioner was however, successful in creating a record at trial that substantiates her claim that the Respondents violated many election laws, the "sunshine laws," (Open Public Meetings Act), and that their injurious actions were prompted by *N.J.S.A.* 19:49-2.[2]

Petitioner seeks a Writ of Certiorari in order for this Court to determine whether *N.J.S.A.* 19:49-2 is unconstitutional as written and applied. The Petitioner lost in the Primary Election by 13 votes. She submits to this Court

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[1] The Petitioner incorporates herein by reference the points and arguments contained in her original brief requesting certiorari.

[2] It should be noted by this Court that the State appeared at trial but declined to participate in any of the trial proceedings. Furthermore, the State has not briefed any compelling State interest to uphold *N.J.S.A.* 19:49-2.

that *N.J.S.A.* 19:49-2 gave unfair advantage to her opponents and cost her the Primary and the right to run in the General Election. She further submits that there is no compelling State interest in this case that can withstand the "strict scrutiny" test warranted by this statute. *Anderson v. Celebrezze*, 460 *U.S.* 780 (1983); *Bullock v. Carter*, 405 *U.S.*134, 142-143 (1972).

N.J.S.A. 19:49-2 was designed to give the hierarchies of the major political parties the power to control who will be party candidates in Primary Elections -- and thus on the party's ticket in the General Election.[3]. It is in direct conflict with the statutory definition of a "Primary election,"[4] i.e., a Primary election is defined as "the procedure whereby the *members of a political party* . . . nominate candidates to be voted for at General elections . . . ." *N.J.S.A.* 19:1. (emphasis added).

The Petitioner submits that *N.J.S.A.* 19:49-2 is discriminatory.[5] It gives one individual in each county, i.e.,

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[3] It should be noted that in demographic areas where one party dominates, winning that party's Primary Election is tantamount to winning the General Election.

[4] See also *Motley v. Halpern*, 267 *N.J. Super.* 325 (Law Div. 1993), which notes that the Primary represents the first step of New Jersey's two stage election system, the process by which members of a political party select that party's candidates for the General Election. It is also "the major avenue of access to the General Election ballot" by which the party membership determines which candidates it chooses to present to the electorate in that General Election. See, *Primary Elections: The Real Party in Interest*, 27 *Rutgers L. Rev.* 298, 305 (1974)."

[5] "When ballot designations are meaningful in content and evenhanded in application, the advantage accruing to any candidate is . . . no more unfair than is the election system itself . . . It is when designations are bestowed selectively . . . that the sense of fair play is justifiably outraged. Such designations are discriminatory . . . ." Kelman, *Ballot Designation; Their Nature, Function, and Constitutionality*, 12 *Wayne L. Rev.* 756, 772 (1966).

the county campaign manager, uninhibited power to create first and second class Republican (and Democrat) candidates by giving first class candidates the column one, preferred position on the ballot along with the Republican party slogan or designation, "Republicans for Responsible Government." In some counties, such as Bergen County where this case originated, the party hierarchy's power is reinforced when the party's chairman dons a second hat and is appointed county campaign chairman.[6] The statute renders the second class candidates powerless since they are not provided a hearing or forum in which to challenge or debate their classification.

The Petitioner submits that by its application, this statute becomes the political party's tool of exclusion rather than inclusion and disassociation rather than association. Simply put, second class candidates are denied their right to associate with Republicans who could in fact be of like philosophy. Furthermore, the sample ballot which is controlled by the campaign manager is mailed to every registered voter and becomes nothing more or less than a political flyer, paid for by the taxpayers, and used by county campaign managers to announce to the electorate their endorsements of anointed candidates. The sample ballot and voting machine ballot brand all candidates that are not hand-picked by the county campaign managers as second class Republicans.

N.J.S.A. 19: 49-2 deprives candidates of valuable

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[6] See *N.J.S.A.* 19:34-52 which prohibits a political party's county committee from endorsing candidates prior to a Primary Election, and *Cavanagh v. Morris*, 121 *N.J. Super.* 430 (1972), a case which is factually analogous to the instant case wherein the court looked at the by-laws of the party organization and held that the county committee (or party) chairman who also wore the county campaign manager's hat, was, in fact, the alter ego of the county committee chairman, and as such violated *N.J.S.A.* 19:34-52 which prohibits a party's county committee from endorsing candidates *prior* to a Primary Election.

property (in the form of first class column position and designation) without due process in violation of the Fourteenth Amendment. It is a "position-biased" and "designation-biased" statute which gives candidates who have the ear of the county campaign manager an unfair advantage in the Primary Election.[7] It gives absolute power to one person, the county campaign manager, who then decides who will represent the Republican Party in a Primary Election. His power includes the power to classify everyone from a national presidential candidate down to a small town municipal council candidate.[8] The campaign manager is not responsible to a constituency. He is not voted into power. He is appointed by the county candidates who have yet to be elected to office. Even so, the county campaign manager decides who is fit to be called a "Republican for Responsible Government," i.e. a true Republican, one that is selected and endorsed by the Republican Party. He is given complete control over the

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[7] Over the past half- century political scientists and statisticians have proven time and time again that ballot position and special designations (including slogans) give candidates a statistical advantage in an election (5 to 61%). Position and designations serve as cues for the "donkey" voter, i.e., the uninformed party voter who has no opinion about the qualifications of candidates and votes the first name on the ballot. *The Effect of the "Donkey" Vote on the House of Representatives*, 10 *Aus. J. of Pol and History*, 221, 225 (1964); *California Ballot Position Statutes: An Unconstitutional Advantage to Incumbents*, 45 S. *Calif. L. Rev.* 365 (1972). See also *Kautenburger v. Jackson*, 333 *P.2d* 293, 295 (1958), which took judicial notice that "it is commonly known and accepted fact that where there are a number of candidates for the same office, the names appearing at the head of the list [on the ballot] have a distinct advantage."

[8] The statute also allows the county campaign manager, i.e. the county committee chairman, to create an organization of loyal, beholding county committee members to perpetuate his reign, inasmuch as the chairman has the power to grant the preferred column one position and the party slogan to candidates for county committee membership!

Primary Election ballots -- subject only to the discretion given to the County Clerk (who in this case is not a disinterested party),[9] who formats the Primary ballot layouts for the printers and programmers of the voting machines. The County Clerk, exercising her broad discretionary power, begins her ballot design by awarding the slate of county candidates the preferred "column one" position. She then (at the direction of the campaign manager/party chairman) removes all second class candidates who may have won this position by luck of a blind drawing pursuant to *N.J.S.A.* 19:23-24 and strips from them the party designation that they may have won pursuant to *N.J.S.A.* 19:23-18.[10]

The Petitioner submits to this court that *N.J.S.A.* 19:49-2 affects voter rights. The voters have the right to expect their party to lead rather than mislead. There is no question that voters presume that the party endorsement is predicated upon the campaign manager's knowledge of the candidates' qualifications and political philosophy -- when in fact, no hearing or forum is available to a candidate to present this information and no attempt is made by the campaign manager

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[9] Respondent County Clerk was the incumbant candidate in the instant Primary Election. She was a member of the county slate which appointed Respondent County Committee Chairman to the position of county campaign manager. She ran in the preferred column one position with the party designation. Although an attorney and an officer of the court, she ignored the holding of *Millman v. Kelly*, 171 *N.J. Super.* 589 (1979), which prohibits a County Clerk from using the sample Primary ballot and the actual ballot as an advertisement of incumbency. She is the only candidate on the ballot mentioned *three times*. (Lodged as B).

[10] It should be noted that at trial the former president of the New Jersey State Association of Municipal Clerks testified that he still gave courses to other municipal clerks, instructing them pursuant to *N.J.S.A.* 19:23-24 and 19:23-18, to hold drawings for column position and certify candidates who were first to file for designation preference pursuant to these statutes despite the seeming conflict of *N.J.S.A.* 19:49-2.

to gather it. And most importantly, *N.J.S.A.* 19:49-2 does not mandate a forum for the candidate.

The Petitioner therefore submits that the same statute that affects the candidate, also affects the right of voters and is therefore the proper object of the "strict scrutiny" standard.

N.J.S.A. 19:49-2 gives the party's county campaign manager *two* opportunities to influence the Primary Election. The first comes when every registered voter is mailed a "sample ballot" which indicates by ballot position and designation the party's endorsed candidates. The second opportunity comes when the voter enters the voting machine and is cued by the ballot to vote for the party's choices.

In conclusion, the Petitioner submits that *N.J.S.A.* 19-49-2 perverts the very essence of the Federal Constitution. It allows a government that was created "by people and for the people" to evolve into one that is politically recreated *by the parties for the parties.*

POINT II THE PETITIONER DOES NOT REQUEST THAT HER PETITION BE TREATED AS AN EXTRAORDINARY WRIT BUT THAT THIS COURT ADDRESS CONSTITUTIONAL ISSUES WHICH LOWER COURTS HAVE HERETOFORE DECLINED TO ADDRESS AND CONTINUE TO EVADE REVIEW.

Respondent in Point II of his brief argues that the Petitioner's did not properly file for an extraordinary writ and should not be granted one.

The Petitioner is not asking for an extraordinary writ.

In Point I the Petitioner submits to the Court that unless the constitutional issues in her petitioner are addressed, the Petitioner will continue to suffer injuries of the same or similar nature inasmuch as she intends to run again for council in the 1999 Primary. To date, the statutes involved in this case

continue in full force and have not been legislatively repealed or modified -- and although candidates have continued to be injured by its application, the full spectrum of constitutional issues surrounding the application of N.J.S.A. 19:49-2 have successfully evaded review with only minor exceptions.

In Points II and III, the Petitioner elaborates on the argument that she "fits the profile" of an injured party who qualified for emergent relief in the New Jersey courts but was denied that relief without opinion. The Petitioner is therefore, in essence, appealing to this Court as a "court of last resort" in an effort to -- and at the very least -- put a halt to the injuries to candidates and voters who rely upon courts to protect their fundamental rights against legislative and executive attack.

POINT III RESPONDENT DID NOT PRESENT PROOFS AT TRIAL TO SUSTAIN THE ALLEGATIONS OF WAIVER, ESTOPPEL, AND LACHES AND THEY ARE THEREFORE INAPPLICABLE TO THE INSTANT CASE.

The above doctrines are defined in *In re: CAFRA PERMIT NO. 87-10959-5*, 290 *N.J. Super.* 498 (1996). The CAFRA court defined "laches," *supra* at 510, as "the neglect, for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done." The record speaks for itself. The Petitioner filed suit within the time limitation prescribed. The court defined "equitable estoppel," *supra*, as "the effect of the voluntary conduct of a party whereby the party is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed, as against another person, who has in good faith relied upon such conduct and has been led thereby to change his position for the worse." The Respondent failed to present evidence to the trial court that the Petitioner had committed any act which caused the

Respondent to change his position for the worse. And lastly the CAFRA Court defined "waiver," *supra*, as "the intentional relinquishment of a known right." The Respondent failed to present evidence of waiver. In short, the Respondent failed to support his allegations with any evidence whatsoever.

POINT IV THE ISSUES AND THE CONSTITUTIONAL VALIDITY OF N.J.S.A. 19:49-2 ARE NOT CONTROLLED BY *QUAREMBA V. ALLAN*, 67 *N.J.* 1 (1975).

In Point IV of the Respondent's brief, Respondent relied upon a case that can be distinguished on the facts from the one before this Court. But more importantly, in 1974 the State Supreme Court did not have the holding of *Anderson v. Celebrezze*, 460 *U.S.* 780 (1983) to guide their reasoning. Furthermore the issues were significantly different.

In 1974 New Jersey still employed paper ballots in six counties. The Plaintiffs challenged the constitutionality of N.J.S.A. 19:49:2, alleging that it (1) creates preferred classes of Primary candidates; (2) favors candidates and voters in rural counties which use paper ballots * * * over candidates and voters in populous counties which use voting machines; (3) favors candidates in counties using voting machines * * * who file a joint petition and those who affiliate with them * * * over all other candidates; and (4) imposes an unequal burden on unaffiliated candidates and thus denies them their constitutional rights.

The *Quaremba* Court held N.J.S.A. 19:49-2 was constitutional, reasoning that the legislature may adopt such regulations that "may control the manner of preparation of the ballot, so long as they do not prevent a qualified elector from exercising his constitutional right to vote for any person he chooses." The Court went on to say, "Even if we were to

disregard the presumption of validity which attaches to N.J.S.A.19:49-2, it is clear that it is not invidiously discriminatory." ". . . one must assume the Legislature intended a ballot so arranged that all voters may find their candidates with the least difficulty the total content of the ballot will permit." *Id.* Furthermore "the public interest is better served by permitting a grouping of candidates having common aims or principles and authorizing those candidates to have this fact brought to the attention of the voter in a Primary election with the additional effectiveness produced by alignment of their names on the machine ballot." *Id.*

In the instant case, the Petitioner is challenging the legislatively unbridled power placed in the hands of a single individual by *N.J.S.A.* 19:49-2 and the issues raised in Point I of this brief -- as well as bringing to the attention of this Court that no compelling State reason had been briefed by the Respondent which can stand the "strict scrutiny" test demanded by the facts in this case.

POINT V **N.J.S.A. 19:34-52 CAN WITHSTAND A CONSTITUTIONAL CHALLENGE GIVEN A COMPELLING STATE REASON FOR BURDENING A FUNDAMENTAL RIGHT.**

The Respondent in Point VII, states that a statute which prohibits the endorsement of candidates by political organizations has been found to violate the First Amendment right of those organizations -- therefore N.J.S.A 19:34-52 is unconstitutional. The Respondent relies upon *San Francisco County Democratic Central Committee, et al v. March Fong Eu*, 826 *F.2d* 814 (9th Cir. 1987).

The Petitioner submits to this Court that when the *Eu* case reached this Court, the Justices opened the door to further challenges of this type of statute. This Court held that

"The challenged California election laws are invalid, since they burden the First Amendment rights of political parties and their members *without serving a compelling State interest.*" *San Francisco County Democratic Central Committee, et al v. March Fong Eu*, 489 *U.S.* 214 (1989).

The Petitioner regrets that the State, although a party in the instant case, has declined to participate in these proceedings and is not raising the obvious compelling interests of the State in preventing a political party from endorsing candidates prior to a Primary Election.

POINT VI PETITIONER IS NOT ATTACKING THE PRESUMPTION OF VALIDITY OF THE ACTIONS OF RESPONDENTS.

The Respondent in Point VII mistakenly repels an illusory attack. The Petitioner agrees with the Respondent that the actions of the County Clerk and Republican County Committee Chairman, a/k/a county campaign manager, were taken in good faith and in reliance upon the New Jersey statutes as they are written. The purpose of this Petition is to challenge the constitutional validity of N.J.S.A. 19:49-2 as written and applied, not to attack those public servants who faithfully carry out legislative mandates (however flawed) to the best of their respective abilities.

CONCLUSION

For all of the aforementioned reasons, the Petitioner requests that a Writ of Certiorari be granted.

Respectfully submitted,

DIANE SANK, *Pro Se* Date: February 16, 1999